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(16,842.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 275.

WILLIAM H. BLACKBURN, PLAINTIFF IN ERROR,

vs.

THE PORTLAND GOLD MINING COMPANY AND W. S. STRATTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

INDEX.

	Original.	Print.
Caption	1	1
Complaint	1	1
Summons	6	3
Marshal's return	8	4
Judgment	9	4
Assignment of errors	10	5
Bill of exceptions	11	6
Motion to dismiss	12	6
Judgment	13	6
Judge's certificate to bill of exceptions	13	7
Certificate as to jurisdiction	14	7
Bond on writ of error	15	8
Writ of error	18	9
Return on writ of error	19	10
Citation	20	10
Proof of service of citation	21	10
Clerk's certificate	22	11

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 21, 1898.

1 Pleas in the circuit court of the United States for the district of Colorado, sitting at Denver.

Be it remembered that heretofore and on, to wit, the 27th day of August, A. D. 1897, came W. H. Blackburn, by J. E. Rockwell, Esq., his attorney, and filed in said court his complaint, and sued out of and under the seal of said court a writ of summons against the Portland Gold Mining Company and W. S. Stratton.

And the said complaint is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court of the Eighth Judicial Circuit, Sitting in and for the District of Colorado.

W. H. BLACKBURN, Plaintiff,
vs.
THE PORTLAND GOLD MINING COMPANY and W. S. Stratton, Defendants. } Complaint.

Now, on this day, comes the plaintiff and complains of the defendants, and for cause of action alleges:

1st. That the amount in dispute in this cause exceeds, exclusive of interest and costs, the sum of two thousand dollars.

2nd. That this suit is between citizens of different States,
2 in this, to wit, that the plaintiff is a resident of Goldfield, El Paso county, Colorado, and a citizen of the State of Colorado; that the defendant The Portland Gold Mining Company is a corporation organized and existing under and by virtue of the laws of the State of Iowa, and the defendant W. S. Stratton is a citizen of Colorado Springs, El Paso county, Colorado, and is a citizen of the State of Colorado, so that this is a suit between citizens of different States, in this, to wit, that the plaintiff is a citizen of the State of Colorado, defendant The Portland Gold Mining Company is a citizen of the State of Iowa, and the defendant W. S. Stratton is a citizen of the State of Colorado.

3rd. That this is a suit of a civil nature at common law and arises under the laws of the United States, as hereinafter stated.

4th. That among the questions of the construction of said statutes arising and necessary to be determined and adjudicated in this action are the following, to wit:

That this is an adverse suit and a suit arising under the provisions of sections 2325 and 2326, Revised Statutes of the United States, and is what is known as a suit in support of an
3 adverse claim, in this, to wit:

That the defendant W. S. Stratton herein applied for a patent for a portion of the Fairplay Lode mining claim, survey lot No. 9331, under and by virtue of the provisions of section 2325, and the plaintiff, under and by virtue of section 2326 of the Revised Statutes of the United States, filed his adverse claim and protest

against the entry of said portion of said Fairplay claim, upon the ground that a part thereof was held and owned by this plaintiff as a part and parcel of the Eacho Lode mining claim, and this is an adverse suit in support of said adverse claim and protest.

Plaintiff further alleges that said W. S. Stratton, one of the defendants herein, on or about the 4th day of February, 1897, made application in the United States land office at Pueblo, Colorado, for patent on said portion of said Fairplay Lode mining claim under and by virtue of the provisions of said section 2325, and that at the time said Stratton made his said application for patent on said portion of said Fairplay Lode mining claim he was not the real owner thereof, neither did he have any interest or title whatsoever therein; that long prior to said time the said Stratton had by good and sufficient deed conveyed all his right, title, and interest in and to said claim to the defendant The Portland Gold Mining Company,
4 who, on said 4th day of February, 1897, was and ever since has been, the real owner and in the actual possession of said claim, and for that reason this plaintiff brings this action against the said The Portland Gold Mining Company jointly with said Stratton.

That at all the times herein mentioned the plaintiff was and now is a citizen of the United States of America.

That heretofore and on the 1st day of February, 1897, and ever since, the plaintiff was and now is the owner of and in the actual possession of the Eacho Lode mining claim, 1,500 by 300 feet, situate in the Cripple Creek mining district, El Paso county and State of Colorado.

That plaintiff claims and has the legal right to occupy and possess said premises and the whole thereof and is entitled to the possession thereof by virtue of a full compliance with the local rules and regulations of miners in said mining district and of the laws of the United States of America and of the State of Colorado and by pre-emption, discovery, and location thereof as a lode mining claim located on the public domain of the United States.

That on the 4th day of February, A. D. 1897, the defendant wrongfully and unlawfully entered into and upon a parcel of the said Eacho Lode mining claim described as follows, to wit: All that part of said claim which is intersected by the exterior lines of
5 survey No. 9331, known as the Fairplay Lode mining claim, as shown by plat marked Exhibit B, filed on the 28th day of July, 1897, in the land office of the United States at Pueblo, Colorado, with the adverse claim of plaintiff against the entry of said survey lot for patent, such ground so intersected being described by metes and bounds as follows:

Beginning at cor. No. 1, Eacho lode, identical with cor. No. 1, Sur. No. 9331, Fairplay lode, thence N. 4° 46′ E. 328.4 ft. to cor. No. 2, Fairplay lode; thence N. 61° 14′ W. 1,500.0 ft. to cor. No. 3, Fairplay lode; thence S. 4° 46′ W. 328.4 ft. to cor. No. 4, Fairplay lode; thence S. 61° 14′ E. 1,500.0 ft. to cor. No. 1, Fairplay lode, the place of beginning, containing 10.331 acres.

That the defendants hath ever since hitherto, and now do, wrong-

fully withhold possession of said parcel of said Eacho Lode mining claim from the plaintiff, to his damage in the sum of one thousand dollars ($1,000.00).

That this suit is brought in support of said adverse claim, and is brought within thirty days after the filing of said adverse claim, and that plaintiff has necessarily disbursed and expended the sum of one hundred dollars for plats, abstracts, and copies of papers filed in said land office with said adverse claim, and also a reasonable counsel fee, to wit, two hundred dollars, for the expense of preparing his said adverse claim.

6 Wherefore plaintiff prays judgment against the defendant:

1st. For a judgment that he is the owner and entitled to the possession of and patent to the above-described parcel of said Eacho Lode mining claim and for the recovery of the same.

2nd. For the sum of one thousand dollars ($1,000.00) damages.

3rd. For the sum of three hundred dollars ($300.00), expended in behalf of said adverse claim.

4th. For costs of suit.

J. E. ROCKWELL,
Attorney for Plaintiff.

(Indorsed:) 3623. United States of America, district of Colorado. W. H. Blackburn, plaintiff, *vs.* The Portland Gold Mining Company and W. S. Stratton, defendants. Complaint. Eacho *vs.* Fairplay. Filed Aug. 27, 1897. Robert Bailey, clerk. J. E. Rockwell, pl'ff's att'y.

And the said summons and proof of service *is* in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the United States Circuit Court for the District of Colorado.

7 *Complaint. Filed in the Clerk's Office This 27th Day of August, A. D.* 1897.

W. H. BLACKBURN, Plaintiff,
versus
THE PORTLAND GOLD MINING COMPANY and W. S. STRATTON, Defendants.

The President of the United States of America to the above-named defendants, Greeting:

You and each of you are hereby notified that an action has been brought in said court by W. H. Blackburn, plaintiff, against you as defendants, to recover the possession of a certain part or parcel of the Eacho Lode mining claim, situate in Cripple Creek mining district, El Paso county, Colorado, for the sum of one thousand dollars damages, for the further sum of three hundred dollars expended in

behalf of said adverse claim, and for the costs of suit, as more fully set forth and described in the complaint filed herein and to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action, in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe; otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

8 Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of [SEAL.] the said circuit court, at the city of Denver, in said district, this 27th day of August, A. D. 1897, and of the Independence of the United States the 122d year.

ROBERT BAILEY, *Clerk.*

Proof of Service.

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

NOVEMBER 3, A. D. 1897.

I hereby certify that I received the within writ on the 27th day of August, A. D. 1897, and that the same is returned without service, in accordance with the written instructions of plaintiff's attorney. This writ therefore returned without service this 3d day of November, A. D. 1897.

J. A. ISRAEL, *Marshal,*
By J. S. WARWICK,
Deputy Marshal.

(Indorsed:) No. 3623. United States circuit court for the district of Colorado. W. H. Blackburn, plaintiff, *versus* The Portland Gold Mining Co. *et al.*, defendants. Summons. Filed Nov. 4,
9 1897. Robert Bailey, clerk. J. E. Rockwell, of Colo. Sp'gs, attorney for plaintiff.

Fifth Day, November Term.

MONDAY, *November 8th, A. D.* 1897.

Present: The Honorable Moses Hallett, district judge, and other officers, as noted on the 2d instant.

W. H. BLACKBURN *vs.* THE PORTLAND GOLD MINING COMPANY and W. S. Stratton.	3623. Action for Possession of Specific Real Property and for Damages.

At this day comes the plaintiff, by Albert Smith, Esq., his attorney, and the defendants, by W. H. Bryant, Esq., their attorney, also come; and the motion of the defendants to dismiss this cause,

coming on now to be heard, is argued by counsel, and the court being now fully advised in the premises, it seemeth to the court now here that it hath not jurisdiction of this cause.

Wherefore it is considered by the court that this cause be, and the same is hereby, dismissed out of this court, and that the defendants go hence hereof without day and have and recover of and from the plaintiff their costs by them in this behalf laid out and expended, to be taxed, and have execution therefor.

10 UNITED STATES OF AMERICA, *District of Colorado,* } ss:

In the Circuit Court for the District of Colorado.

W. H. BLACKBURN, Plaintiff in Error,
vs.
THE PORTLAND GOLD MINING COMPANY and W. S. STRATTON, Defendants in Error.

Assignment of Error.

Now comes W. H. Blackburn, the plaintiff in error, by his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

I.

The court erred in sustaining the motion of defendants below.

II.

The court erred in deciding that an adverse suit or suit brought in support of a protest and adverse —, under the provisions of section 2325 and section 2326 of the Revised Statutes of the United States, did not raise a Federal question and confer Federal jurisdiction.

III.

The court erred in deciding that W. S. Stratton was not a nominal party, and that the making of said Stratton a party defendant defeated or ousted the jurisdiction of the Federal court.

11 IV.

The court erred in ruling that the Federal court had no jurisdiction of the cause stated in said complaint.

V.

The court erred in dismissing the plaintiff's complaint.

VI.

The court erred in not dismissing the action as to W. S. Stratton, defendant, the resident of Colorado, and proceeding with the action

against The Portland Gold Mining Company, defendant, the non-resident of the State of Colorado.

CHAS. J. HUGHES, JR.,
Attorney for Plaintiff in Error.

(Indorsed:) 3623. U. S. circuit court. W. H. Blackburn *vs.* The Portland Gold Mining Co. *et al.* Assignment of errors. Filed Dec. 18, 1897. Robert Bailey, clerk. Chas. J. Hughes, Jr., pl'ff's att'y.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court.

W. H. BLACKBURN, Plaintiff,
vs.
THE PORTLAND GOLD MINING COMPANY and W. S. STRATTON, Defendants.

12 Be it remembered that heretofore and at the November term, A. D. 1897, of the said court, this cause came on to be heard before the court upon motion to dismiss; which said motion was in words and figures as follows, to wit.

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In the Circuit Court.

W. H. BLACKBURN, Plaintiff,
vs.
THE PORTLAND GOLD MINING COMPANY and W. S. STRATTON, Defendants.

Come now the defendants above named, by Thomas, Bryant and Lee, their attorneys, and move the court to dismiss the above-entitled cause for the following reasons, to wit:

1st. This court has no jurisdiction either of the parties or the subject-matter of said suit.

2nd. That noth the plaintiffs and defendants in said suit are citizens of the State of Colorado, and the same is not one wholly between citizens of different States.

3rd. It does not appear in said complaint that the amount in controversy in said suit is two thousand dollars.

4th. That it appears from said complaint that said suit is one which cannot under the Constitution and statutes of the United States be brought in this court.

A. T. GUNNELL,
THOMAS, BRYANT & LEE,
Att'ys for Defendants.

And thereupon certain proceedings were had in said cause, and after argument of said motion the following order was entered of record, to wit:

13 W. H. BLACKBURN
vs.
PORTLAND GOLD MINING CO. & W. S. STRATTON. } # 3623.

At this day comes the plaintiff, by Albert Smith, Esq., his attorney, and the defendants, by W. H. Bryant, Esq., their attorney, also came; and the motion of defendant to dismiss this cause coming on now to be heard, is argued by counsel; and, the court being now fully advised in the premises, it seemeth to the court now here that it hath not jurisdiction of this cause.

Wherefore it is considered by the court that this cause be, and the same is hereby, dismissed out of this court, and that the defendants go hence hereof without day and have and recover of and from the plaintiff their costs by them in this behalf laid out and expended, to be taxed, and have execution therefor.

And forasmuch as the said several matters had and done in said cause objected to and insisted upon, as aforesaid, do not appear in the record, plaintiff, by his counsel, brings this his bill of exceptions and asks that the same be signed, sealed, and made a part of the record herein, which is accordingly done, in pursuance of the statute in such case made and provided, on, to wit, this 20 day of Dec., A. D. 1897.

MOSES HALLETT,
Dist. Judge.

(Indorsed:) No. 3623. W. H. Blackburn *vs.* The Portland Gold Mining Company *et al.* Bill of exceptions. Filed Dec. 20, 1897. Robert Bailey, clerk.

14 UNITED STATES OF AMERICA, } *ss:*
District of Colorado, }

In the U. S. Circuit Court.

WILLIAM H. BLACKBURN, Plaintiff,
vs.
THE PORTLAND GOLD MINING COMPANY, Defendant. } No. 3623.

I, Moses Hallett, district judge of the United States within and for the district of Colorado, do hereby certify that the above-entitled cause came on for hearing before the court, and it appearing to the court that the circuit court of the United States did not have jurisdiction to try the same, the said cause was by the court dismissed for want of jurisdiction.

That said question of the jurisdiction of the circuit court of the United States was the only one involved in said cause, and was the sole question upon which the said cause was dismissed and the final decree entered, and is the question upon which a writ of error is prayed.

MOSES HALLETT, *Judge.*

(Indorsed:) 3623. U. S. circuit court. William H. Blackburn *vs.* Portland Gold Mining Company. Certificate as to jurisdiction. Filed Mar. 14, 1898. Robert Bailey, clerk.

15 THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, William H. Blackburn, as principal, and Eben Smith & R. H. Reid, are held and firmly bound unto the Portland Gold Mining Company in the full and just sum of five hundred dollars, to be paid to the said The Portland Gold Mining Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at the November term, A. D. 1897, of the circuit court of the United States for the district of Colorado, in a suit pending in said court between William H. Blackburn, plaintiff, and The Portland Gold Mining Company, defendant, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error to the Supreme Court of the United States and a citation directed to the said The Portland Gold Mining Company, citing and admonishing it to be and appear in the United States Supreme Court, at the city of Washington, D. C., thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said William H. Blackburn shall prosecute said writ of error to
16 effect and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM H. BLACKBURN. [SEAL.]
EBEN SMITH. [SEAL.]
R. H. REID. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved M'ch 17, 1898.
MOSES HALLETT, *Judge.*

Justification.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

William H. Blackburn, as principal, and Eben Smith and R. H. Reid, sureties, on the within bond, being each first duly sworn, deposes and saith that he is worth in real estate the sum below set opposite his name—that is to say, as to Eben Smith, one thousand dollars—over and above all his just debts and liabilities and in property subject to levy and sale upon execution.

WILLIAM H. BLACKBURN.
EBEN SMITH.
R. H. REID.

Subscribed and sworn to before me, at Denver, this 15th day of March, A. D. 1898.

My commission expires Dec. 22, 1901.

[SEAL.] HARRY C. WATT,
Notary Public.

17 (Indorsed:) Gen. No., 3623. Circuit court of the United States, district of Colorado. Wm. H. Blackburn *vs.* The Portland G. M. Co. Bond on writ of error, $500. Filed Mar. 17, 1898. Robert Bailey, clerk.

18 *Writ of Error to Circuit Court U. S., District of Colorado.*

THE UNITED STATES OF AMERICA.

[Vignette.]

UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

The President of the United States to the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, between William H. Blackburn and The Portland Gold Mining Company, a manifest error hath happened, to the great damage of the said William H. Blackburn, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the 15th day of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Seal United States Circuit Court, District of Colorado.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the United States the 122d year.

ROBERT BAILEY, *Clerk.*

Allowed by—
MOSES HALLETT, *Judge.*

19 [Endorsed:] Gen. No., 3623. Circuit court of the United States. Wm. H. Blackburn, plaintiff in error, *vs.* The Portland

Gold M. Co. & W. S. Stratton. Writ of error to circuit court U. S., district of Colorado. Filed Mar. 17, 1898. Bobert Bailey, clerk. —— ——, attorney for plaintiff in error.

Return.

THE UNITED STATES OF AMERICA, }
District of Colorado, } ss:

In obedience to the command of the within writ I herewith transmit to the honorable Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Witness my hand and the seal of said circuit court, at Denver, in said district, this fifth day of April, 1898.

[Seal United States Circuit Court, District of Colorado.]

ROBERT BAILEY, *Clerk,*
By CHARLES W. BISHOP,
Deputy Clerk.

20 *Citation, U. S. — Court.*

THE UNITED STATES OF AMERICA, }
District of Colorado. }

[Vignette.]

The United States of America to the Portland Gold Mining Company and W. S. Stratton, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Colorado, wherein William H. Blackburn is plaintiff in error and you are defendant-in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the district court of the United States for the district of Colorado, this 17 day of March, in the year of our Lord one thousand eight hundred and ninety-eight.

MOSES HALLETT, *Judge.*

21 [Endorsed:] Gen. No., 3623. — court of the United States, district of Colorado. Wm. H. Blackburn, plaintiff in error, *vs.* The Portland G. M. Co. & W. S. Stratton, defendant- in error. Citation. Filed Mar. 17, 1898. Robert Bailey, clerk. —— ——, attorney for plaintiff in error.

Service is hereby accepted this — day of March, A. D. 1898.
THOMAS, BRYANT & LEE,
Attorneys for Def'ts in Error.

22 UNITED STATES OF AMERICA, }
District of Colorado, } ss:

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing pages, numbered from one to seventeen, both inclusive, to be a true, perfect, and complete transcript and copy of the record and proceedings, and of all thereof, heretofore filed or had and entered of record in said court and in a certain cause lately in said court pending, wherein W. H. Blackburn was plaintiff and The Portland Gold Mining Company and W. S. Stratton were defendants, as fully and completely as the same still remain on file or of record in my office at Denver.

Seal United States Circuit Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this fifth day of April, A. D. 1898.

ROBERT BAILEY, *Clerk*,
By CHARLES W. BISHOP,
Deputy Clerk.

Endorsed on cover: Case No. 16,842. Colorado C. C. U. S. Term No., 275. William H. Blackburn, plaintiff in error, *vs.* The Portland Gold Mining Company & W. S. Stratton. Filed April 9th, 1898.

No. 270.

Brief of Hughes for P. in E.

The Supreme Court

Filed Apr. 1, 1897.

OF THE

UNITED STATES.

OCTOBER TERM, 1896.

W. H. BLACKBURN,
Plaintiff in Error,

VERSUS

THE PORTLAND GOLD MINING COMPANY, AND W. S. STRATTON,
Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

CHARLES J. HUGHES, Jr.,
Attorney for Plaintiff in Error.

THE R. J. HUGHES PRESS, LEADVILLE, COLORADO.

IN

The Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, 1898.

W. H. BLACKBURN,

Plaintiff in Error,

VERSUS

THE PORTLAND GOLD MINING COMPANY, AND W. S. STRATTON,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

Statement of Case.

The plaintiff in error, the plaintiff below, brought his action against The Portland Gold Mining Company and W. S. Stratton, defendants, alleging that the amount in dispute, exclusive of interest and costs, exceeded the sum of two thousand dollars; that it was a suit between citizens of different states in this that the plaintiff was a citizen of the

State of Colorado; the defendant, The Portland Gold Mining Company, was a citizen of the State of Iowa, and the defendant W. S. Stratton, a citizen of the State of Colorado; that the suit was of a civil nature, and arose under the laws of the United States; that among the questions of the construction of said statutes, arising and necessary to be determined and adjudicated, were the following:

That the suit was an adverse suit and arose under the provisions of sections 2325 and 2326 of the Revised Statutes of the United States, being known as a suit in support of an adverse claim in this, to wit, that the defendant, W. S. Stratton, applied for patent for a portion of the Fairplay lode mining claim under the provisions of section 2325 of the Revised Statutes of the United States, and the plaintiff, under and by virtue of section 2326 of the Revised Statutes of the United States, filed his adverse claim and protest against the entry of the Fairplay claim upon the ground that a part thereof was held and owned by him as part and parcel of the Eacho lode mining claim, and that said suit was in support of that adverse and protest; that W. S. Stratton, about the fourth of February, 1897, made application in the United States land office at Pueblo, Colorado, for patent on said portion of Fairplay lode mining claim, under section 2325 of the Revised Statutes of the United States, and at that time he was not the real owner nor did he have any interest or title whatsoever therein; that long prior to such time the said Stratton had, by good and sufficient deed, con-

veyed all his title to the defendant, The Portland Gold Mining Company, which company, on the fourth day of February, 1897, was and ever since has been the real owner and in actual possession of said claim, and for that reason the action is brought against The Portland Gold Mining Company, jointly with said Stratton.

Then follows an allegation of the location of the Echo lode mining claim, and the claim of the plaintiff to occupy and possess it in compliance with the laws of the United States as a lode mining claim located on the public domain of the United States, and the allegation that on the fourth day of February, 1897, the defendant wrongfully and unlawfully entered into and upon a portion of the said claim, and made application for patent, that plaintiff in due time filed adverse and protest against the issuance of such patent, that the suit was brought within thirty days after the filing of the adverse, and judgment was demanded that the plaintiff be adjudged the owner and entitled to the ground in controversy, for the sum of one thousand dollars damages, and three hundred dollars for expenses in behalf of the adverse claim, and for costs of suit (printed record, pages 1–3).

The defendants filed a motion to dismiss the complaint upon the ground: (1) that the court had no jurisdiction, either of the parties, or of the subject matter of the suit; (2) that both the plaintiff and the defendants in said suit were citizens of the State of Colorado, that the same was not wholly between citizens of different states; (3) that it does not appear in said complaint that the

amount in controversy in said suit was two thousand dollars; and (4) that it appears in said complaint that the suit is one which under the Constitution and statutes of the United States can not be tried in that court (printed record, pages 5–6).

The third ground of the motion was withdrawn at the argument, the court sustaining the motion to dismiss (printed record, pages 6–7).

The court did not file an opinion in the case, and hence the plaintiff in error was not able to comply with the rule of this court requiring the same to be filed herein. The grounds upon which the motion was sustained were that an adverse suit was not a suit such as was within the jurisdiction of the United States court; and that the said Stratton was not such a nominal party that his citizenship might be ignored in determining the jurisdiction of the federal court on the ground of diversity of citizenship.

ASSIGNMENT OF ERRORS.

I.

The court erred in sustaining the motion of defendants below.

II.

The court erred in deciding that an adverse suit, or suit brought in support of a protest and adverse—under the provisions of section 2325 and section 2326 of the Revised Statutes of the United States, did not raise a federal question and confer federal jurisdiction.

III.

The court erred in deciding that W. S. Stratton was not a nominal party, and that the making of said Stratton a party defendant defeated or ousted the jurisdiction of the federal court.

IV.

The court erred in ruling that the Federal Court had no jurisdiction of the cause stated in said complaint.

V.

The court erred in dismissing the plaintiff's complaint.

VI.

The court erred in not dismissing the action as to W. S. Stratton, defendant, the resident of Colorado, and proceeding with the action against The Portland Gold Mining Company, defendant, the non-resident of the State of Colorado.

(Record, pp. 5–6.)

I.

The motion to dismiss should not have been sustained, since the objection to the jurisdiction of the court could not be raised in that manner, but by demurrer or plea in abatement.

Hoyt *et al.* v. Wright, 1 McCrary, 130; 4 Fed. Rep., 168.

Clarkhuff v. Wisconsin, etc., Co., 26 Fed. Rep., 465.

Black's Dillon on Removal, Sec. 215.

II.

Plaintiff in error contends that the interest of Stratton in connection with the litigation was of such a nature that his being joined as a party defendant did not prevent the action being one between citizens of different states, to wit, between the plaintiff, a citizen of the State of Colorado, and The Portland Gold Mining Company, a citizen of the State of Iowa. An examination of the record discloses that Stratton had conveyed all his title and interest, of every kind and nature in the Fairplay claim to The Portland Gold Mining Company, and that at the time the adverse suit was brought Stratton had no interest in the claim but that the application for patent was being prosecuted by and for the defendant, The Portland Gold Mining Company. Stratton had been an owner, the date of the termination of his title is shown to have been prior to the fourth of February, 1897. This suit was instituted on the twenty-seventh of August, 1897 (printed record, page 1), and adverse was filed on the twenty-eighth day of July, 1897, (printed record, page 3).

Stratton was upon the record in the suit only because of his connection with the original application for patent. His ownership having ended, he had no interest in the controversy between the plaintiff and the defendant, The Portland Gold Mining Company, and he was therefore, under the facts disclosed in the complaint, a nominal party only. Under the decisions therefore, the jurisdiction of the United States court upon the

ground of diversity of citizenship was not defeated by his presence upon the record.

Arapahoe County v. Kas. Pac. Ry. Co., 4 Dill., 277.
Walden v. Skinner, 11 Otto, 577.
McNutt v. Bland *et al.*, 2 How., 9.
Brown v. Strode, 5 Cranch, 303.
Coal Co. v. Blatchford, 11 Wall., 172–177.
Irvine v. Lowrie, 14 Peters, 298.
Bannafee v. Williams, 3 How., 574.
Beebe v. Louisville, etc., Co., 39 Fed. R., 481.
Belding v. Gaines, 37 Fed. R., 817.
Collins v. Wellington, 31 Fed. R., 244.
Nelson v. Hennessy, 31 Fed. R., 113.
May v. St. John, 38 Fed. R., 770.
Myers v. Nelson, 43 Fed. R., 695.
Brown v. Nelson, 46 Fed. R., 614.
Juda v. Iowa Barbed Wire Co. *et al.*, 32 Fed. R., 561.
Black's Dillon on Removal of Causes, section 76, 77.
Henderson v. Cabel, 43 Fed. R., 257.
Rickman v. Rickman, 1 Fed., 587.
Dunton v. Muth *et al.*, 45 Fed. R., 390.
Hoyt *et al.* v. Wright, 1 McCrary, 130; 4 Fed. R., 168.
Clarkhuff v. Wisconsin, etc. Co., 26 Fed. R., 465.

III.

The action is one arising under the laws of the United States and therefore cognizable in the fed-

eral ccurt, and the motion should have been denied. The right to institute this action is created by a federal statute; without this statute, this mode of procedure, this very action, this cause of action, would have had no existence. The plaintiff's right to bring the action is conferred by the statute, as was the right to file the adverse, in support of which said action was brought. The whole procedure in the land office and in the courts is a creature of federal legislation.

An adverse suit is a part of the proceedings in the land office for the obtaining of title to government land. It is a reference from the land office, made because the land office has not the powers of a court to compel the attendance of witnesses, nor officers to enforce its orders. In many respects an adverse suit differs from an ordinary suit. The time for presenting it is not determined by the statute of limitations, or other laws of the forum, but by the United States statute, fixing it at thirty days.

The cases of Mars v. Oro Fino M. Co., 65 N. W. Rep., 19, and Steves v. Carson, 42 Fed. Rep., 321, were dismissed for failure to bring suit within the time limited by the Federal statute, thirty days, when, if they had been ordinary cases, a cause of action in ejectment would have been maintained. The dismissal was because it was an action brought under and controlled wholly by the United States statutes.

It is essential that the parties state that the adverse was filed during the period of publication, or within sixty days from the application for

patent; and further, that the suit was brought within thirty days.

Mattingly v. Lewishon, 19 Pac. Rep., 310.

The ordinary verdict found under the statute in an ejectment case is not sufficient, but a special finding must be made, which is then sent back to the land office for its guidance.

These differences, and others, are illustrated in the following cases:

Perego v. Dodge, 163 U. S., 160.
Rockwell v. Graham. 9 Colo., 36.
Doherty v. Morris, 11 Colo., 12.
People *ex rel.* Darby v. District Court, 19 Colo., 343.

Keeler v. Trueman, 15 Colo., 146, holds that actions of this character are purely statutory.

Marshall Silver Mining Co. v. Kirtley, 12 Colo., 410, holds:

"The allegations in the complaint that the action is brought in support of an adverse claim, must be held as determining the character and object of the action."

Michael v. Mills, 22 Colo., 439, holds that certain instructions, otherwise immaterial,

"Ought to have been given, for this action is not an ordinary action to recover the possession of real property, but in effect, involves the validity of the respective locations under the mining law."

Citing—

Becker v. Pugh *et al.*, 9 Colo., 589.

In the case of Perego v. Dodge, 163 U. S., 160, Chief Justice Fuller, after reviewing the proceed-

ings for patent, filing of the adverse, and the bringing of an adverse suit, said:

"The determination of the right of possession between the parties is referred to a court of competent jurisdiction in aid of the land office;"

And again said:

"The whole proceeding is merely in aid of the land department; and the object of the amendment was to secure that aid as much in cases where both parties fail to establish title as where judgment was rendered in favor of either."

Becker v. Pugh, 9 Colo., 589, holds:

"No one can read it and not arrive at the conclusion that the suit was brought under an adverse, filed to contest defendant's application for patent for the premises in controversy, and that the purpose of the pleader was to put in issue and try questions which, by section 2326 of the Revised Statutes of the United States are submitted to the court for adjudication."

Manning v. Strehlow, 11 Colo., 451-455, holds:

"This is not an action under the statutes of the state to determine the mere question of the right of possession, but an action authorized by the laws of Congress to determine the rights of a party to be invested with the fee."

Bennett v. Harkrader, 15 Supreme Court Reporter, 863; 158 U. S., 441, holds:

"Again, in this action, brought under a special statute of the United States in support of an adverse claim, but one estate is involved in the controversy. No title in fee is or can be established. That remains in the United States; and the only question presented is the priority of right to purchase the fee. Hence, the inapplicability of a statute regulating generally actions for the recovery of real estate, in which actions different kinds of title may be sufficient to sustain the right of recovery. It would be pure surplusage to find in terms a priority of the right to purchase when that is the only question that can be litigated in such statutory action. If the plaintiff owns the fee, he is not called upon to file an adverse claim, or commence such an action, and the statute providing therefor has no application. Mining Co. v. Campbell, 135 U. S., 286."

Doe v. Waterloo Min. Co., 43 Fed. Rep., 219, holds:

"The proceedings here in question are purely statutory, and they had their inception, not in the court in which the suits were commenced, but, as said by the Supreme Court in Wolverton v. Nichols, 119 U. S., 488; 7 Sup. Ct. Rep., 289, by the assertion of the defendant's claim to have the patents issue to it for the land in controversy. The next step was the filing of an adverse claim by the plaintiff in the land office, and the present suits are 'but a continuation of those proceedings, prescribed by the laws of the United States, to have a determination of the question as to which of the contesting parties is entitled to the patents. The act of Congress requires that the certified copy of the judgment of the court shall be filed in the land office, and shall be there conclusive. And we must keep this main purpose of the action in view in any decision made with regard to the rights of the parties.' In that case, a statute of Montana, where the case arose, provided for the bringing of an action by any person in possession, by himself or his tenant, of real property, against any persons claiming an adverse interest therein, for the purpose of determining such adverse claim. A nonsuit was granted by the District Court, and affirmed by the Supreme Court of the territory, upon the ground that the plaintiffs were not in possession of the property at the time of the bringing of the suit; but the Supreme Court held that as the suit was brought pursuant to the provisions of sections 2325 and 2326 of the Revised Statutes, the view taken by the territorial court of the local statute was too restricted, and accordingly reversed the judgment. * * * I am of opinion that these suits are special statutory proceedings, which, in the absence of a statutory provision that there shall be a jury trial in them, belong, from their nature, on the equity side of the court. Not only is the right the court is required to determine not the appropriate subject of an action at law, but the sole purpose of its judgment is for the guidance of the land department. No writ of any nature issues for its enforcement, but a certified copy of it is required to be filed by the officers of the land department, and they required to act in accordance with it. Congress saw proper to refer contests for mineral lands to the courts for trial; but it need not have done so. It could have directed such contests to be tried by the officers of the land department, just as contests respecting pre-emption claims and rights are required to be tried."

The case of Campbell v. Ellett, 167 U. S., 116, was taken by writ of error from the Supreme Court of Colorado, apparently for no other reason than that it was an adverse case, as no diversity of citi-

zenship appears in the case. In the report below, 18 Colo., 510, the following appears on page 511:

"The appellant, Alfred S. Ellett, was plaintiff below, and, by his guardian, brought this suit in the District Court, in support of an adverse claim to a certain mineral lode or vein, situate in Gold Hill mining district, Boulder County, Colorado;"

And on page 518, the following:

"In determining the controversy thus presented it is necessary to consider, interpret, and if necessary, construe the statutory enactments applicable to the discovery and location of mineral lodes."

In the same case, in 167 U. S., Mr. Justice Brewer, after giving a history of the location of the claim, says:

"Having made an application for a patent, the defendant in error filed an adverse claim and commenced a suit, as required by the statute. United States Revised Statutes, 2326."

The rights which are asserted by the plaintiff and defendant, both in the land office and in the litigation, arise out of federal legislation concerning the disposition of property belonging to the government of the United States, and in the litigation concerning it and on it the disposition of the property of the government the United States is directly concerned. Since the act of 1881, there is presented in the trial of every adverse case, the question whether the plaintiff, the defendant or the *United States* shall be adjudged to be the owner of the land in controversy. We have, then, the title to be asserted, dependent upon a federal statute with reference to the disposition of the public domain of the United States, and requiring a construction of federal statutes prescribing the acts to be performed and the methods to be fol-

lowed in acquiring title thereto. We have also a jurisdiction conferred upon United States land offices for the purpose of disposing of government lands and settling disputes between rival claimants thereto, and as between both claimants thereto and the United States. There is further, the machinery of the courts authorized and controlled by the same United States statutes. It would seem impossible to conceive an action more clearly cognizable in the federal court than the adverse suit here brought. When we turn to decisions in analogous cases, we fine it uniformly held that in such cases the federal courts have jurisdiction.

The exact question here presented has been decided in this circuit by Justice Miller, sitting upon the Circuit Court bench, in the cases of The Frank G. and S. Min. Co. v. The Larimer M. and S. Co., 1 Colo. Law Reporter, 491; 1 Morrison Min. Reports, 150, 151; 8 Fed. R., 724. In an adverse case, upon a motion to remand when it had been removed to the federal from the state court, because it was an adverse case, Justice Miller said:

"The defendant made application for patent for a mining claim in Lake county, to resist which plaintiff filed in the land office an adverse claim, and thereupon filed complaint in the District Court for Lake county. Defendant, after answer, filed a petition for removal of the cause to the Circuit Court of the United States, on the ground that the subject matter of the action arises under the laws of the United States, and the case was removed accordingly.

"This hearing is a motion to remand the cause to the state courts for trial. The act of Congress of March 3, 1875, provides that the 'United States Circuit Courts shall have original jurisdiction of the subject matter of all cases arising under the constitution and laws of the United States.' It is impossible that such an action as this can be determined without reference to, and involving a construction of the mining laws of Congress. The questions involved necessarily arise under the laws of the United States; and hence this court has original

jurisdiction of the subject matter of the action, and the case was properly removable. The motion to remand must be denied."

It has also been well said that the cause of action would not have existed, and the action itself could not have been brought but for the authorization thereof by the federal statutes.

In the case of Rutter *et al.* v. Shoshone Mining Co. 75 Fed. R., 37, Judge Beatty, rendering the opinion, said:

"This action is in pursuance of section 2326, Revised Statutes, and is based upon an adverse claim by complainant to the application of defendant for patent to mining ground. All except two of the several causes of demurrer to the original complaint are cured by the amended complaint, which complainants are permitted to file. In the remaining causes are involved the questions (1) whether such suits arise under the laws of the United States, and (2) whether they are at law or in equity.

"It seems settled by the authority of several Circuit Court decisions that such cases are within the jurisdiction of the United States courts. In the last case upon the subject, Burke v. Concentrating Co., 46 Fed., 644, the question was directly raised, and was fully considered and decided by Judge Sawyer. Defendant now cites Bushnell v. Smelting Co., 148 U. S., 682, as holding a contrary view. While this was a suit of the nature provided for by section 2326, it was commenced and tried in the state court, where the only question for decision was as to the course of a ledge. The first attempt to suggest a federal question was by a petition in the state Supreme Court for rehearing, and the United States Supreme Court says this was too late to be considered, even if a federal question were involved in the case. It also says that the question turned largely upon the construction of a state statute prescribing the width of mining locations. While there is some intimation only, not a declaration, that the pleader must specially plead some facts showing that a federal question is involved, the decision seems to rest solely upon the procedure had in the state court, which was for the settling of a single fact that in no way involved the construction of any United States statute."

This case was appealed to the Circuit Court of Appeals for the ninth circuit, where it was affirmed by Judges Hawley, District Judge, and

Ross, Circuit Judge; Gilbert, Judge, dissenting. See case of Shoshone Mining Co. v. Rutter, reported in 87 Federal Reporter, at page 801, from which we quote as follows:

[Syllabus.]

1. ADVERSE CLAIMS TO MINING LAND—JURISDICTION—FEDERAL QUESTION.

"A suit brought in pursuance of Revised Statutes, section 2326, based upon an adverse claim made upon the filing of an application for a patent for mining ground, is a suit arising under the laws of the United States, and is within the jurisdiction of the Circuit Court. 75 Fed., 37, affirmed.

OPINION.

"HAWLEY, District Judge. This is a suit in equity brought under the provisions of section 2326 of the Revised Statutes to determine the rights of the respective parties to certain mining ground situated in Yreka mining district, Shoshone county, Idaho. On August 21, 1895, appellant applied for a patent to the Shoshone lode claim. Appellees thereafter filed their protest and an adverse claim against said application, and in due time commenced this suit in support of their claim in the Circuit Court of the United States for the district of Idaho. Both parties are citizens and residents of the State of Idaho. A demurrer was interposed to the complaint, and overruled by the court. (75 Fed., 37.) The cause thereafter came to issue, was tried upon its merits, and resulted in a decree in favor of the appellees. The questions presented by the demurrer will be first considered:

"'1. Appellant claims that the Circuit Court had no jurisdiction to try the case. Does the complaint in this case show upon its face that the suit is one arising under the laws of the United States? This question, under the repeated decisions of the courts in this and other circuits, has been, so far as we are advised, universally answered in the affirmative. Different grounds have been stated and different reasons assigned by the various courts, but the conclusion has always been the same—that the Circuit Courts of the United States have jurisdiction to try all cases instituted under and by virtue of the provisions of section 2326 of the Revised Statutes, independent of the question of citizenship of the respective parties. (Frank G. and S. M. Co. v. Larimer M. and S. Co., 8 Fed., 724; Cheesman v. Shreve, 37 Fed., 36; Doe v. Mining Co., 43 Fed., 219; Strasburger v. Beecher, 44 Fed., 209, 213; Burke v. Mining Co., 46 Fed., 644, 646; Wise v. Nixon, 76 Fed., 3, 6.) But it is argued by appellant's counsel that all of these decisions have been virtually overruled by the decision of the Supreme Court in the case of Bushnell v. Mining Co., 148 U. S., 682, 13 Supreme Court, 771. As we

understand the decision in that case, no such question as is here presented was there raised, discussed or decided. That action was brought in the state court, tried in the state court, and an appeal was taken to the Supreme Court of the state; and after a petition for rehearing was filed, the losing party for the first time suggested that a federal question was involved, to wit, a construction of section 2322 of the Revised Statutes. The petition for rehearing being denied, a writ of error was sued out, and the case taken to the Supreme Court of the United States. The writ of error was there dismissed on the ground—to quote the language of the decision:

" 'The attempt to raise for the first time a federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing, after judgment, is not properly raised, so as to authorize this court to review the decision of the highest court of the state.'

"No question was raised as to the competency of the courts, either national or state, to try a case brought under the provisions of section 2326. The only question at issue there, under the pleadings and at the trial, was as to the true course of the lode or vein. The instructions referred to in the opinion had reference to that question only, which was solely a question of fact; and the court said that no federal question was involved—that is, that no question was raised which called for any construction of section 2322. The other decisions that we have cited go directly to the point raised in this case. In Burke v. Mining Co., 46 Fed., 644, 646, the Court said:

" 'It is claimed on one side, and denied on the other, that this suit, having been brought to determine the title to a mining claim, in pursuance to the requirements of section 2326 of the Revised Statutes, as amended in March, 1881 (1 Supp. Rev St., p. 609), is for that reason a suit arising under the laws of the United States, within the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the questions involved in the litigation. It seems to us that all the authorities, as they now stand, have determined the question in favor of the affirmative of this proposition.'

"In Jackson v. Roby, 109 U. S., 440, 3 Sup. Ct., 301, which was a suit brought in the Circuit Court of the United States for the district of Colorado, in support of an adverse claim under the provisions of section 2326 of the Revised Statutes, the Court disposed of the case upon its merits, and it is certainly fair to assume that it had no doubts as to its jurisdiction in the premises. In Chambers v. Harrington, 111 U. S. 350, 4 Sup. Ct., 428, it was claimed that a judgment rendered in a suit brought under the provisions of section 2326 of the Revised

Statutes was not subject to review in the Supreme Court. The Court said:

"'But it is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review, as in other similar cases.'

"The proceedings required to be commenced, under the provisions of section 2326, in a court of competent jurisdiction, may be brought either in the state or national courts, at law or in equity, as the facts may warrant; but section 2326 does not confer any special jurisdiction on the state courts. When the suits are brought and tried in the state courts, they are subject to the provisions of the state statutes in relation to such cases, and the courts proceed in the manner prescribed by such statutes. The proceedings in the national courts are regulated by the provisions of section 2326, as will more fully appear in the consideration of the next question involved herein. In several Pacific Coast states, statutes have been passed for the purpose of supplementing the provisions of section 2326, and the cases, when tried in the courts of such states, are controlled by such statutes, independent of any other provisions of the state statutes. Rose v. Mining Co., 17 Nev., 25, 52, 27 Pac., 1105; 2 Lindl, Mines, sections 754, 755, and authorities there cited. In Steel v. Mining Co., 18 Nev., 87, 1 Pac., 450, the Court said:

"'These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy; and the only sensible construction of the law is that each party must prove his claim to the premises in dispute, and that the better claim must prevail.'

"Now, if there were no statute of the state specially providing for the trial of this class of cases, it might be that the state courts would not be able in all cases to try questions required to be heard and determined by section 2326, as amended. But, be that as it may, our conclusion is that, upon reason and authority, the circuit courts of the United States have jurisdiction to hear and determine the respective rights of the parties in controversies arising under the provisions of section 2326, if the property in controversy exceeds in value the sum of $2,000, independent of the question of the citizenship of the respective parties, or of the fact as to whether or not the case presents any federal question involving the construction of any other provisions of

the laws of the United States. In other words, that a circuit court of the United States is 'a court of competent jurisdiction' to try such cases, within the meaning of those words as used in said statute."

The decision of a case by one of the Circuit Courts of Appeal of the United States, until reversed by the Supreme Court, should be followed by the Circuit Courts in another circuit.

Fairfield Floral Co. v. Bradbury, 87 Fed. Rep., 415.

From the foregoing case we quote as follows:

[Syllabus]

"In general, the courts of one circuit should follow the decisions of the Court of Appeals in another circuit, where the point in question has not been passed upon by the Supreme Court."

Opinion by PUTNAM, Circuit Judge:

* * * *

"If I were to follow my own judgment, I should say that Congress, neither directly nor through the Postmaster General, or anyone else, has any constitutional authority to impose the penalty of forfeiture of the use of the mails of the United States, at least without a trial. But I am not sure that I will be able to follow my own convictions in this case, even if on a final hearing they remain as they now stand. I am not sure that I will not be bound by the decision of the Court of Appeals in the sixth circuit (Association v Zumstein, 15 C. C. A., 153, 67 Fed., 1000), when the case comes to a final hearing. My own view is, that the decisions of the Court of Appeals in one circuit should ordinarily be followed quite implicitly by the courts in other circuits. The case in the sixth circuit does not seem to have been taken to the Supreme Court. I cannot find anything to indicate that it was taken up by writ of error or otherwise, and it seems to have been left on the decision of the Court of Appeals; so that it stands today the highest judicial authority which we have on the validity of the statute."

Under the above ruling, it was error for Judge Hallett to dismiss this bill.

In Burke *et al.* v. Bunker Hill and S. Mining and Concentrating Co., 46 Fed. R., 644, there is a

full and able discussion of the entire question here presented, by Circuit Judge Sawyer, with whom sat in that decision District Judge Beatty. It is not merely upon the question, but is a full discussion of the authorities relating to it; and especially is there well preserved the effect of the statute of 1881, being the amendment to section 2326 of the Revised Statutes of the United States, found in 1 Sup. Rev. St. U. S., 609.

Judge Sawyer, among other things, says:

"It seems to us that all the authorities, as they now stand, have determined the question in favor of the affirmative of this proposition. Thus the point was directly decided on the circuit on a motion to remand, this being the only point of the motion, by Mr. Justice Miller of the Supreme Court, in Frank G. and S. M. Co. v. Larimer M. and S. Co., 8 Fed. Rep., 724. A like decision was made by Justice Brewer, then circuit judge, in Cheesman v. Shreve, 37 Fed. Rep., 36. So the same ruling was made by Knowles, J., in Strasburger v. Beecher, 44 Fed. Rep., 213. Says the judge:

"'As to this suit, I am clearly of the opinion that it is one which arises under the laws of the United States. It is a suit instituted in pursuance of the provisions of section 2326 of the Revised Statutes of the United States. (See Frank G. and M. Co. v. Larimer M. and S. Co., 8 Fed. Rep., 724.) One of the objects of such an action is to determine who is entitled to a patent to the premises in dispute. The judgment is filed in the United States land office on the determination of the action. To some extent the United States is a party to the action. (See Jackson v. Roby, 109 U. S., 440.) This decision must be based upon the theory, it appears to me, that the action, pursuant to an adverse claim, has for one of its objects the determination as to whether either party has divested the United States of the possessory title to the premises in dispute.'

"That is to say, it is not only intended to determine the rights of the two parties as between themselves, but also as between each of the parties and the United States, so as to determine finally whether either party has so far performed the conditions prescribed by the statute, as to entitle him to pay for the mine and receive a patent from the United States, thereby making the United States substantially, though not formally, a party to the suit and entitled

to have their rights determined in the national courts. This idea is supported by the amendment to section 2326 of 1881 (1 Sup. Rev. Stat., 609), which provides as follows:

"'That if, in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party; the jury shall so find, and judgment shall be entered according to the verdict. In such cases costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.'

"It would seem that, under section 2326, as it originally stood, when a party applied for a patent to a mine, and there was an adverse claimant, the parties were referred to the ordinary courts to determine in the usual actions, applicable to the cases, the rights of the adverse claimant only as between themselves; such as an action to recover possession when out of possession, and a suit to determine an adverse claim when in possession, the question between the successful party and the government being left to the determination of the commissioner of the land office. But the amendment seems designed to change the whole proceedings, and refer, not only the question of the rights of the parties as between themselves, but also, without making the United States formally a party, to transfer the whole matter, as between the United States and the successful party to the courts, thereby making the United States, substantially, though not formally, parties to the suit; and on that ground, it would seem, that the United States are entitled to have their rights determined in the national courts. Jackson v. Roby, 109 U. S., 444, and Wolverton v. Nichols, 119 U. S., 485, seem to support the idea, also, that not only the rights of the parties as between themselves, but also the rights as between the parties, respectively, and the United States, are to be conclusively determined. These rulings cited from the Federal Reporter appear to be sustained by the Supreme Court of the United States in Chambers v. Harrington, 111 U. S., 350, where the Supreme Court entertained an appeal, apparently, because it was an action brought under section 2326, Revised Statutes. (See also, Doe v. Mining Co., 43 Fed. Rep., 219.) Whatever we might think, were this a case of first impression, arising under section 2326 before its amendment, we do not feel at liberty now, to question the ruling of so many cases decided by eminent judges, and by the United States Supreme Court, as we understand their decisions. We therefore hold, upon these

authorities, that the record shows a case for national jurisdiction, as arising under the laws of the United States, for the reason that it was brought in pursuance of the requirements of section 2326 as amended, and therefore, it is not within the decisions of Trafton v. Nouges, 4 Sawy., 178, and Water Co. v. Keyes, 96 U. S., 199, and cases following these decisions. These jurisdictional facts all appear in the pleadings and are not required to be otherwise shown in the request, or petition, to transfer to this court."

Con. Wyo. Co. v. Champion M. Co., 62 Fed., 945.

As also sustaining these views, although not upon the direct question here presented, we quote from—

NORTHERN PAC. R. CO. *v.* COLBURN (164 U. S., 383).

[Syllabus.]

"1. A decision by the Supreme Court of a state adverse to a claim of title by a railroad company under a congressional land grant, involves a federal question."

HUSSMAN *v.* DURHAM (165 U. S., 144).

[Syllabus.]

"1. A decision of the Supreme Court of a state denying the validity of an equitable title, apparently conveyed by proceedings in the United States land office, and of tax titles based thereon, involves a federal question."

Mr. Justice BREWER says:

"A motion to dismiss was submitted by the defendant in error, but, as the Supreme Court of the state held that the equitable title apparently conveyed by the proceedings in the United States land office in 1858, was of no effect, and the tax titles based thereon of no validity, it is apparent that a right claimed under the *authority of the United States* was denied, and therefore this court has jurisdiction."

Ex Parte LENNON (166 U. S., 548).

[Syllabus.]

"2. A bill by one railroad company against another and its employes to enforce the interstate commerce act by enjoining defendants from refusing to receive plaintiff's cars, presents a case arising under the constitution and laws of the United States. 12 C. C. A., 134, 64 Fed., 320, affirmed."

OPINION.

(By Justice BROWN.)

"Irrespective of this, however, we think the bill exhibited a case arising under the constitution and laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the interstate commerce act of 1887, and to compel the defendants to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to receive from complainant, for transportation over their lines, any cars which might be tendered them. It has been frequently held by this court that a case arises under the constitution and laws of the United States, *whenever the party plaintiff sets up a right to which he is entitled under such laws*, which the parties defendant deny to him; and the correct decision of the case depends upon the construction of such laws. As was said in Tennessee v. Davis, 100 U. S., 257, 264: 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.' See also Starin v. City of New York, 115 U. S., 257; 6 Sup. Court, 28; Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co.; 112 U. S., 414; 5 Sup. Court, 208; Ames v. State of Kansas, 111 U. S., 462; 4 Sup. Court, 437; Railroad Co. v. Mississippi, 102 U. S., 135."

SPOKANE FALLS & N. RY. CO. *v.* ZEIGLER (167 U. S., 65).

[Syllabus.]

"1. Though a complaint by a settler claiming title under the pre-emption laws of the United States against a railroad company, states that defendant claims under the laws of the territory of Washington authorizing railroad companies to appropriate land for right of way, it discloses a cause of action arising under the laws of the United States, so as to authorize a removal from a state court to the federal court, the court having judicial knowledge that the authority of the territory to legislate as to the matter in question is derived from the act of Congress of March 3, 1875 (18 Stat., 482), granting to railroad companies the right of way through the public lands of the United States."

OPINION.

(By Justice SHIRAS.)

"Whether it would be competent for the plaintiff in error, in the circumstances stated, to challenge the jurisdiction of the Circuit Court at this stage of the controversy, we need not consider, because we think that the plaintiff's statement did disclose a cause of action arising under the laws of the United States, and cognizable by the Circuit Court.

"In his complaint, the plaintiff alleged that on May 1, 1889, he was in possession, as a pre-emptor under the laws of the United States, of a tract of land containing about 80 acres, and on said date had made all the improvements, and had lived on the land a sufficient length of time, and had done all other acts necessary to entitle him to a patent to the same from the United States, that the defendant company, being a corporation of the territory of Washington, on said date entered upon and seized a strip of land 50 feet in width, and appropriated it for railroad purposes, without the consent of the plaintiff, and without having compensated him therefor; and that the entry upon and seizure by the defendant of the land was under and pursuant to the laws of the territory of Washington, authorizing railroad companies to appropriate lands for right of way for railroad tracks.

"We have judicial knowledge that the authority of the territory to legislate in respect to the right of a territorial railroad corporation to enter upon the public lands of the United States, was derived from the act of Congress entitled, 'An act granting to railroads the right of way through the public lands of the United States,' approved March 3, 1875 (18 Stat., 482), whereby the right of way through the public lands of the United States was granted to any railroad company duly organized under the laws of any state or territory.

"The plaintiff's complaint, therefore, discloses the case of a contest between a settler claiming title under the laws of the United States and a railroad company claiming a right under an act of Congress, and of such a case the Circuit Court for the district of Washington clearly had jurisdiction. Doolan v. Carr, 125 U. S., 620; 8 Sup. Court, 1228; Cooke v. Avery, 147 U. S., 375; 13 Sup. Court, 340."

CALIFORNIA NAT. BANK *v.* KENNEDY (167 U. S., 362).

[Syllabus.]

"1. Where a national bank is sought to be charged as stockholder in another corporation, the averment in its answer that the stock was issued to it 'without authority of law,' must be construed as referring to the law of the United States governing national banks, and therefore raises a federal question."

OPINION.

"Mr. Justice WHITE, after stating the case, delivered the opinion of the court.

"Before discussing the merits, we will briefly consider and dispose of a suggestion that no federal question appears by the record to have been properly raised below, and therefore there is a want of jurisdiction in this court to review the judgment. The answer averred that, if any stock of the savings bank appeared to have been issued to the national bank, it was 'issued without authority of this corporation

defendant, and without authority of law.' In view of the fact that the defendant was a national bank, deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question, if entered into, was without authority of law, can, in reason, be construed only to relate to the law controlling and governing the conduct of the corporation; that is the law of the United States. But, if there were ambiguity on this subject, it is entirely removed by the grounds which were presented on the motion for a new trial and the specifications of error which form the basis of the appeal which was taken to the Supreme Court of the State of California, for in both the motion and specifications the want of power under the laws of the United States was clearly asserted. The Supreme Court of the state interpreted the case brought to it from the court below as presenting the question of the power of the corporation, under the law of the United States, to become a stockholder in a savings bank, for in the opening sentence of its opinion, it said:

'The California National Bank, one of the defendants, has appealed upon the ground that, by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it cannot be made liable for any portion of the indebtedness of the corporation.'

"The suggestion as to the want of jurisdiction is therefore without merit.

"The federal questions which therefore arise on the record may be thus stated: (1) Do the statutes of the United States (Rev. St., sec. 5136 *et seq.*) relating to the organization and powers of national banks prohibit them from purchasing or subscribing to the stock of another corporation? And (2) if a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?"

NEW ORLEANS M. AND T. R. CO. *v.* MISSISSIPPI (102 U. S., 135–144.)

[Syllabus.]

* * * * * *

"2. A suit in a state court brought by the state against a railroad company to procure the removal of a railroad bridge across a navigable river, in which the defendant, in support of its right to construct and maintain the bridge across such river, invokes the protection of an act of Congress, is a case arising under the laws of the United States, and is removable from the state into the federal court.

COOKE *v.* AVERY (147 U. S., 375).

"While, under this section and section 967, judgments recovered in federal courts were liens in all cases where they were such by the

laws of the states, these sections did not recognize any right in the states to regulate the operations of federal judgments; and, in a case where the laws of the state respecting the liens of judgments were changed after the enactment of these sections into the Revised Statutes, the question whether a judgment thereafter recovered in a federal court constituted a lien upon land was one which depended upon a construction of the federal laws and rules of court, and was therefore a question of federal jurisdiction."

AMES *v.* KANSAS. KAN. P. R. CO. *v.* KANSAS (111 U. S. 449).

[Syllabus.]

"2. Where the whole purpose of a suit in a state court is to test the validity of the consolidation of certain railroad companies, which rests alone on the authority conferred for that purpose by acts of Congress, the case arises under the laws of the United States within the meaning of the acts as to the removal of causes."

OPINION.

"That the validity of the consolidation, so far as the state is concerned, rests alone on the authority conferred for that purpose by the acts of Congress, is not denied. If the acts of Congress confer the authority, the consolidation is valid; if not, it is invalid. Clearly, therefore, the cases arise under these acts of Congress, for, to use the language of Chief Justice Marshall in Osborn v. United States Bank, 9 Wheat., 825, an act of Congress 'is the first ingredient in the case, is its origin, is that from which every other part arises.' The right set up by the company, and by the directors as well, will be defeated by one construction of these acts, and sustained by the opposite construction. When this is so, it has never been doubted that a case is presented which arises under the laws of the United States. Cohens v. Va., 6 Wheat., 379; Gold Washing and Water Co. v. Keyes, 96 U. S., 201 (XXIV., 658); R. R. Co. v. Miss., 102 U. S., 140 (XXVI., 98).

KANSAS PACIFIC R. CO. *v.* ATCHISON ETC., R. R. Co. (112 U. S., 414)

[Syllabus.]

"3. A controversy arises upon laws of the United States, where two corporations claim title to the same land under sufferent acts of Congress, and the decision depends upon the construction given to those acts."

OPINION.

"The controversy in this case arises upon laws of the United States. As far back as Cohens v. Va., decided more than sixty years ago, it was said that a case may be considered to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either; 6 Wheat, 379. The same thing is expressed by the statement that a case arises under the Constitution or laws of the United States whenever the rights set up by a

party may be defeated by one construction or sustained by the opposite construction. Osborn v. Bank, 9 Wheat., 738. Here both corporations claim title to the same land in Kansas under different acts of Congress and the decision depends upon the construction given to those acts. It is, therefore, clear that the court below had jurisdiction of the subject of the suit and of the parties."

DOLAN *v.* CARR (125 U. S., 618).

[Syllabus.]

"Where the controversy in an action turns upon the validity of a patent from the United States, under which plaintiff claims title, in ejectment, which is denied by defendant, the Circuit Court has jurisdiction of the case, although no citizenship of either party is alleged."

OPINION.

"No citizenship of either party is alleged, and this is urged as a ground of reversal in this court, to which the case has been brought by a writ of error. It, however, appears very clearly that the controversy turns upon the validity of the patent from the United States under which plaintiff claims title, and which was denied by the defendants. The Circuit Court for the district of California, therefore, had jurisdiction of the case as one arising under the Constitution and laws of the United States within the meaning of the act of March 3, 1875, 18 U. S. Stat. at L. 470.

DUNTON *v.* MUTH (45 Fed., 390.)

[Syllabus.]

"In an action in ejectment, where it appears that both parties claim under deeds from the trustee holding the legal title of a townsite on public lands, under the provisions of Rev. Stat. U. S., sec. 2387, and both claim to be *cestuis qui trustent* under the statute, the case is removable, as involving a federal question."

OPINION.

"It was decided in Water Co. v. Keyes, 96 U. S., 199, that facts showing the case is one arising under the Constitution or laws of the United States should be stated, and not legal conclusions; or, in other words, it is not sufficient for a party in his petition for removal to allege that the case is one that arises under the Constitution and laws of the United States, or under any specific law. The application in this case, however, sets forth that both parties claim under deeds from the trustee created by said section 2387 of Revised Statutes U. S., and that both claims to be *cestui qui trustent* under said statute. In this case the predecessors of one of the parties to this action, or the other party, must have been the one for whom the trustee provided for in said section received title to said premises;

which one, will depend upon the proper construction of said statute. In the case of Van Allen v. Railroad Company, 3 Fed. Rep., 545., it appears that the plaintiff claimed a town lot, and in the answer the defendant alleged the town lots were held by him under the provision of the townsite-act of Congress, and that he never had possession, and his claim under said act of Congress was fraudulent and void, and it was held the case involved a federal question. In the case of Choens v. Virginia, 6 Wheat., 264, it was held:

'A case in law or equity consists of the right of one party as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either.'

"I feel that the correct determination of this case depends upon the construction of said section 2387, and that the petition states facts sufficient to show this.

"The fact that a judgment in the state court in an action involving a contest between mining claims is *res judicata* of the questions litigated in an action removed to the federal court, does not deprive such court of jurisdiction, as a contest between mining claims necessarily involves a consideration of the laws of the United States as to the location and the effect of end lines and side lines on the rights to the mineral veins and lodes, and, as the evidence whereby these things are proved, whether direct or through estoppel by some act of the party, or by a judgment of a court, does not remove consideration of the laws as elements of decision.

"A contest between mining claims necessarily involves a consideration of the laws of the United States. These laws prescribe how the locations shall be made, and the effect of end lines and side lines and the rights to the mineral veins and lodes. The evidence by which these things are proved, whether direct or through the estoppel of some acts of the parties, or by a judgment of a court, does not remove consideration of the laws as elements of decision.

"Con. Wyoming Mining Co. v. Champion Mining Co., 62 Fed., 945.

"A suit at law or in equity may be said to present a federal question so as to come within the jurisdiction of the courts of the United States, when it involves a controversy as to the validity, interpretation or application of the acts of Congress relating to the public lands, such as those regulating the acquisition and disposition of homesteads, pre-emption claims, town sites, mining claims and the like. Thus, a suit in which the complaint sets up an entry of public land by the plaintiff, and the subsequent issue of the patent, and seeks to establish an interest in the land during the interval by an application of the doctrine of relation, is a case of federal cognizance, since the determination of the applicability of such doctrine to the case requires

the construction of the federal statutes, and a consideration of the effect of acts thereunder.

"Where one of the adverse parties in an action of ejectment, or other suit concerning land, sets up and relies upon a title derived by him under the laws of the United States, and the other party denies the validity of the patent or grant relied upon, the issue thus formed arises under the acts of Congress, and brings the case within the jurisdiction of the federal courts. A suit to enforce a contract for the sale of land, brought by the vendor, claiming title under a grant by act of Congress, against the purchaser and his alienee, the latter contesting plaintiff's claim under such act, presents a case cognizable by the federal courts. And the same is true of an action upon an adverse proceeding to prevent the issuance of a patent to a mining claim.

"In the next place, where the two parties claim adversely to each other, and each bases his claim on a title alleged to have been derived under a law of the United States, each necessarily disputing the validity of the other's title, a federal question is raised, and the national courts will have jurisdiction of the controversy. This is the case, for example, where the suit involves a contest between a prior patent and a subsequent patent to the same land, the authority of the land department to issue the later patent being disputed, or where the contest is between a title acquired under the homestead law and a title founded on a patent, or where two corporations claim title to the same land under different acts of Congress, and the decision depends upon the construction given to those acts, or where the dispute is between adverse mining claims, and the interpretation of the laws regulating such claims is involved. So, the federal courts will have jurisdiction of a bill for an injunction to restrain a railroad company from extending its road across land belonging to the United States, and to which the complainant claims to have an equitable title as a pre-emptor, where the question in dispute is whether the complainant has a right to the land under the laws of the United States.

"But it has been held that, where it appears, in ejectment, that both parties claim under deeds from a trustee holding the legal title of a town site on public land, under the provisions of the act of Congress, and both claim to be *cestuis que trustent* under the statute, the case is removable as involving the federal question.

"Black's Dillon on Removal of Causes, Sec. 118."

Citing numerous cases.

The statutes of the United States constituting the mining code, and adopted May 10, 1872, together with the amendment of 1881, referred to,

undertake to make a disposition of the public mineral domain of the United States, to declare what is public mineral domain, to grant and define the right of citizens, and those who have declared their intention to become citizens, to enter upon and prospect the public domain, to locate mining claims thereon, and purchase the title thereto, from the United States government. They define also the several acts of discovery and location, and define the rights which are acquired thereby. They make provision for legislation by the states, and for regulations by the miners, all of which are made only by virtue of the authority thus conferred by the United States, and must in nowise be in conflict therewith. They then make provisions for land offices and the proceedings therein. They also make provisions for the institution of suits which could not be instituted but for this permission, and hence lode claimants have the right to bring actions like the one now in question only because these statutes expressly grant that power. They also make provision for an adjudication, in the trial of every adverse case, of the rights not only of the litigants between themselves, but as against the United States.

The title remains, throughout the suit, in the United States, and the suit is a proceeding for the information of the officers of the United States, to guide them in their disposition of the land, and for this reason alone, an adverse suit undoubtedly involves a federal question, especially as the Supreme Court of the United States has held that, even after the United States, had passed title, a

contest over the title of claims under various federal laws involves a federal question and gives federal jurisdiction.

From all this, it follows that this action is authorized by, arises out of, is brought under, and must be controlled by federal legislation. While different reasons are given by the courts for maintaining federal jurisdiction in the numerous cases outside of adverse suits, which we have cited, all of these reasons and causes are united and exist in adverse suits.

See U. S. Revised Statutes, sections 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326 (amendment, March 3, 1881), 2327, 2328, 2329 and 2335.

From the citations we have made and the extracts we have presented from numerous decisions, it appears that the courts familiar with adverse suits, and the questions which necessarily arise and must arise in their progress, have held and hold that an adverse suit is one arising under the laws of the United States, and, therefore, cognizable in the federal courts. When it is recalled, as we have hereinabove stated, that the right to bring the suit, the time within which it shall be brought, the purposes for which it is instituted, and the effect of the judgment rendered in it, are all solely for the purpose of enlightening and aiding the land department of the United States in the disposition of the public mineral domain, and that these suits are authorized, controlled, and their effect determined solely by federal statutes, it would seem that the jurisdiction over them by federal courts as "courts

of competent jurisdiction" is absolutely established.

The United States statutes, cited *supra*, define what must be done in order to make a location; they further provide the steps which must be taken in the effort to purchase a lode mining claim from the government of the United States. Among these provisions, and of essential and material character, as indicated by the statutes and as held by the courts, are the application to the surveyor general, publication of notice, institution of suit, and trial thereof with due diligence. Added to all these provisions is one of equal concern and importance, which requires that the jury shall not only determine the controversy between the plaintiff and defendant in an adverse suit, but shall also say, by their verdict, whether or not either the plaintiff or the defendant has a right to the land as against the government of the United States.

The United States Circuit Court, under the rules, principles, and decisions we have invoked, had jurisdiction. The order, therefore, dismissing the case, was error, and the ruling of the court below should be reversed.

The question presented is one of importance; for its decision will determine the right of a litigant to have a federal court pass upon the acquisition of title to land from the government, wherein all the proceedings and decisions are authorized and must be controlled by federal legislation.

The reasoning of the courts uniformally holding jurisdiction to exist, seems so clear and cogent

that we have not sought to add thereto. With the single exception of the decision of the District Judge of Colorado, the federal courts have invariably held that in adverse cases the federal court has jurisdiction. We can but feel that the opinions of these judges, brought so directly in contact with the interpretation of these statutes, and the trials under them, ought to be of great weight.

CHARLES J. HUGHES, JR.,

Attorney for Plaintiff in Error.

No. [illegible]

Brief of Hughes for P. in Error

Filed Nov. [illegible], 1899.

The Supreme Court

OF THE

UNITED STATES.

October Term, 1899.

W. H. BLACKBURN,
Plaintiff in Error.

v.

THE PORTLAND GOLD MINING COMPANY AND W. S. STRATTON,
Defendants in Error.

BRIEF OF THE PLAINTIFF IN ERROR IN REPLY.

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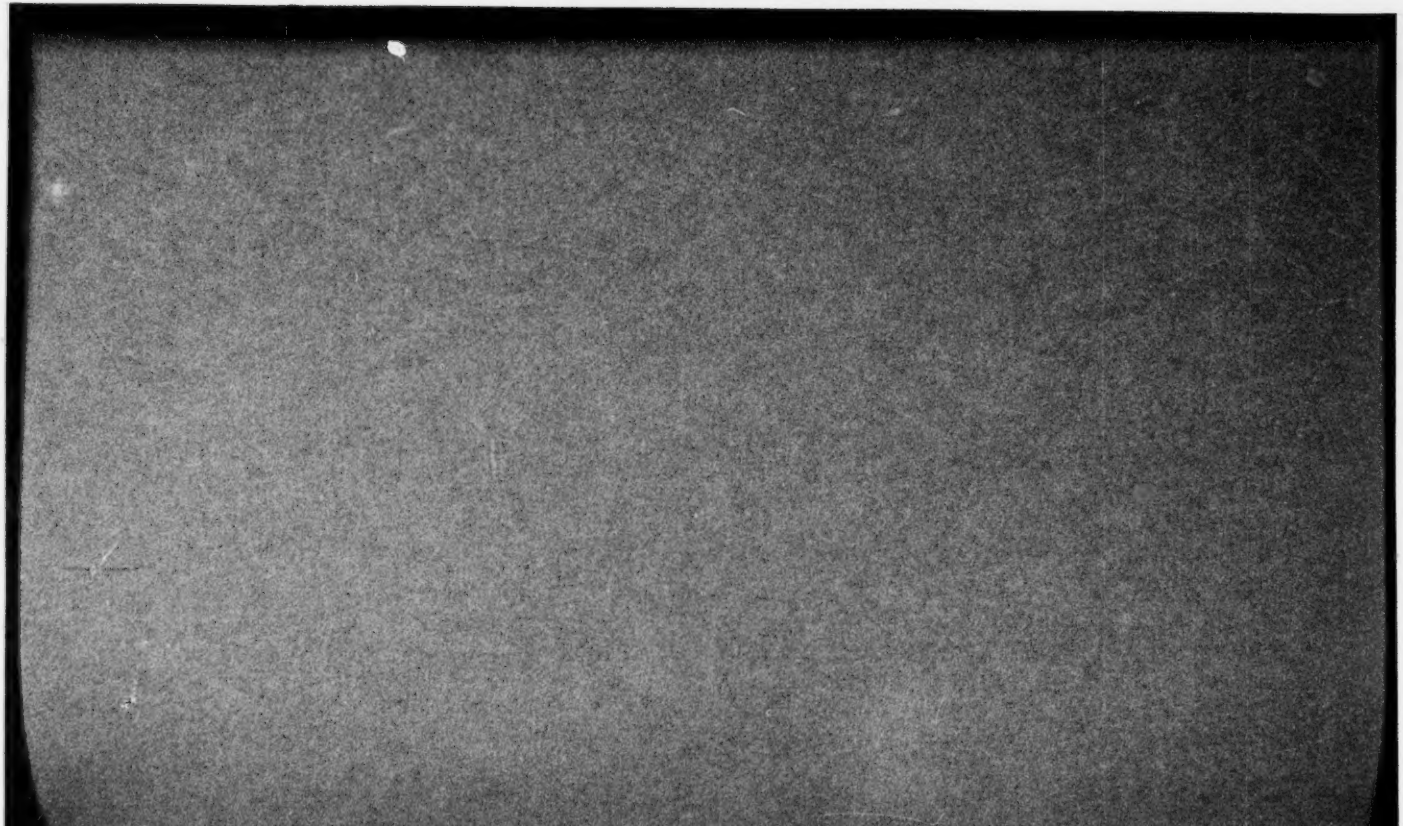

IN

The Supreme Court

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October Term, 1898.

W. H. BLACKBURN,
Plaintiff in Error,
v.
THE PORTLAND GOLD MINING COMPANY AND W. S. STRATTON,
Defendants in Error.

No. 275.

BRIEF OF THE PLAINTIFF IN ERROR IN REPLY.

We have cited in our original brief herein a long list of authorities, showing that one of the defendants below, W. S. Stratton, having parted with title before he made his "application for patent," so that thereafter all proceedings were necessarily for the benefit and use of his grantee, The Port-

land Gold Mining Company, he was not a real party in interest, and, while his name was being used, nevertheless, it appearing, and the complaint so alleging, that The Portland Gold Mining Company was the party in interest, it alone was a real party to the controversy, and therefore, the party whose citizenship affected the question of jurisdiction.

A complaint is insinuated that the opinion of the court below in this case is not in the record. Its absence is due to the fact that the court below declined to file an opinion or to permit one to go upon the record. This position of the Court, and no delinquency on the part of the plaintiff in error prevents this Court having the benefit of all that was contained in that opinion.

It is a well settled proposition, which needs no extended citation of authorities in its support that, where an application for patent is made by one who grants away the title upon which that application is based, all title which comes to the applicant inures to the benefit of his grantee. In Colorado a quit-claim deed has been held sufficient to convey all present and after-acquired title, all legal and equitable rights.

Bradbury v. Davis, 5 Colo., 265.

When if at all the deed from Stratton to the defendant company was recorded, when knowledge of it existence was acquired, are not disclosed by the complaint. The complaint does disclose, however, that at the time of making the application for patent, which is one of the steps in the proceed-

ings taken in the Land Office, to secure a patent from the government, the defendant Stratton had parted with all title to the claim sought to be patented. An examination of the federal statutes which are quoted in extenso in the briefs of the plaintiff in error and defendant in error, heretofore filed herein, with regard to the patenting of lode mining claims, will show that the application for patent is not the first step in the proceeding, but one of the later ones, coming after the survey has been ordered and approved and the matter sent to the local Land Office for further proceedings there.

Morrison's Mining Rights (9th ed). Title, "Application for Patent," pp. 345–361.

Lindley on Mines, Vol. 2, Chapter 3, Secs. 677, 678, 680, 690, 691, 695.

Hence, if the proceeding had been permitted to go forward in Stratton's name, notwithstanding he had conveyed away the title, the result would have been a patent for the use and benefit of the defendant The Portland Gold Mining Company, which would have required no deed from Stratton thereafter in order to vest the title in it.

Elwood v. Flannigan, 104 U. S., 562.

From which it seems clear, that by the conduct of these defendants, a situation had arisen which made it unsafe to omit either as a defendant in the litigation, and yet, on the allegations of the facts, which are conceded for the purposes of this argument to be true, made Stratton a party who had no such interest as would affect the jurisdiction on account of his citizenship.

II.

The amount involved is alleged to exceed the sum or value of two thousand dollars. This is an allegation of fact, not a conclusion of law. The subsequent allegation of one thousand dollars damage in the detention of the property and three hundred dollars of expenditures does not destroy the effect of or antagonize or narrow the precedent allegation. The litigation is for the purpose of determining who is entitled to a patent—which is the absolute title—as well as the possession and enjoyment of the portion of the mining claims in conflict. Under the practice prevailing in Colorado, the adverse suit authorized by the federal statute is assimilated to the code suit for the purpose of securing possession of specific real estate, which code form of action has taken the place of the common law action of ejectment. If the plaintiff or defendant in this adverse litigation is successful, the land department will thereupon deliver a patent to the successful litigant. This litigation absolutely determines the respective rights of the parties to the property in dispute. Its entire value, all the title which can possibly be obtained, are involved and will be determined. Under the code a recovery of certain damages is permitted to be coupled with a determination that the litigant is entitled, not only to the possession of the property, but, so far as the Court can settle that matter, to a patent from the United States. The federal statute having authorized a determination of this controversy

in a court of competent jurisdiction, and having provided the force and effect which shall thereto be given, it follows necessarily that it is the value of the property, not the price which the government receives therefor, and not the mere possession, which is involved and fixes the amount or value in controversy. While some technical carping may be indulged in because the complaint did not allege the *matter*, instead of the *amount* in dispute, the meaning of the allegation is clear; it can not be misapprehended; and it is borne out by the complaint, in saying that the value of the property, as well as the damages claimed, were united in the allegation that the amount in dispute exceeded the sum or value of two thousand dollars. The allegation having been made that the amount in dispute exceeded two thousand dollars, and having been followed by a specific allegation of certain damages, which were less than two thousand dollars, it follows quite logically, we apprehend, that the remainder of the value, which when added to these specifications, exceeded two thousand dollars, is to be found in the value of the mining claim itself. The price paid to the government for the land has never been taken to be the actual value of the property. The same price is paid to the government per acre for the richest bonanza bearing lodes as for those in which the values are problematical and exist largely in the hope and imagination of the anxious miner. It is because the claim is worth much more than five dollars an acre that a patent is sought and a controversy arises.

There are no decisions holding that the form of allegation employed in this complaint is a mere conclusion of law or insufficient as a compliance with the spirit and purpose and all the requirements of the statute. The overrefined criticism made upon the use of the word "amount" as contrasted with the word "matter" has no foundation in substance. There can be no misapprehension of the meaning of the complaint. The amount in this instance means the sum of the values which are the subject of litigation, which are in contention between the parties, and which will be affected by the litigation. In the present instance, the entire value of the territory in dispute in the adverse was involved in the controversy, as well as the thirteen hundred dollars of damage alleged.

In Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co. (45 Fed. Rep., 545), the Court held that, for the purpose of determining the jurisdictional amount in a bill to quiet title, the whole value of the property, the possession or enjoyment of which is threatened by defendant, is the measure of the value of the matters in controversy, the Court saying, upon this subject:

"Without stopping now to invoke, in answer to this objection, the effect of a demurrer to the well-pleaded averment of a jurisdictional fact, it is sufficient to say that I think the proper criterion of the 'value of the matters involved in the controversy,' is to be found in the value of the property, the possession or enjoyment of which will be affected by the result of the litigation. For the purposes of this suit I should not hesitate to hold that the whole value of the property, the possession and enjoyment of which is imperiled by the threatening acts of the defendant, is the

measure of the value of the matters put in controversy by it. If any other test than this should be substituted, very many suitors would be debarred from seeking the protection of the federal courts, and those tribunals would be stripped of a very important branch of their hitherto acknowledged jurisdiction, especially upon their equity side. What would become of suits for the reformation of a written agreement, for the cancellation of alleged forged or fraudulent deeds, for the specific performance of contracts to convey lands, and many others of like character, if, upon the question of jurisdictional value of the matters in controversy, the courts were limited to the pecuniary value of the deed, the contract, the agreement as such, and were barred from considering the value of the thing affected by, or the subject-matter of, those various writings. Take, for instance, the case of a forged deed of conveyance. Suits to compel the surrender and cancellation of such dangerous documents are not nncommon in the federal courts. But on what principle can jurisdiction be maintained if the question of the 'value of the matters in controversy' be raised? What is the value of a 'forged deed?' Simply nothing. If it be forged, it is absolutely valueless; but, for jurisdictional purposes, it must be held to have, to the rightful owner of the premises pretended to be conveyed by it, the whole value of the premises themselves, the possession and enjoyment of which are menaced and put in peril by its existence. The application of this test to the case at bar is obvious. It may, indeed, be true that the claims of the defendant to the property in possession of the complainant are groundless; it may be held that the deeds, leases, agreements, and adjudications of the courts, upon which and from which the complainant base and claim its right, are invulnerable to any attack which, in pursuance of its threats, the defendant may make. That will appear at the end of the litigation, but the 'matter in controversy' is not the result of the litigation, but the property which will be affected by that result, and its value is the value which does or does not confer jurisdiction as it may be summed up."

In the case of Kenady v. Edwards, 134 U. S., 117, Mr. Justice Harlan, in rendering the opinion, said:

"The appellees have moved to dismiss each of these appeals upon the ground that the value of the matter in dispute is not

sufficient to give the court jurisdiction; and with the motions to dismiss was joined a motion to affirm the decree as to each appellant. Both motions to dismiss are overruled. As to Kenady, the decree denies his right to property of which he claims to be the owner, and which is of the value of eleven thousand dollars. He paid that sum, in cash, to Green, as trustee. It is true that there are funds in the registry of the court below, which, in the event of the affirmance of the decree, can be paid over to him, and he be thus far reimbursed for what he paid to Green on the purchase of the property. *But we think that the value of the specific property which is in litigation must determine the jurisdiction of this court.*"

That the amount in the controversy was not limited to the thirteen hundred dollars is clear, because it is hardly to be assumed that there would be an allegation of more than two thousand dollars involved, followed by an allegation of one of thirteen hundred dollars. This case differs from those cited by counsel, and from the principle upon which they rely, in that there is here combined the value of the property and the amount of the damages. If no damages whatever had been alleged, and the complaint had been the statement that the amount involved exceeded two thousand dollars, and had asked for a judgment entitling the plaintiff to the possession of the real estate, but one conclusion could be drawn, that the real estate involved in the controversy exceeded in value the sum of two thousand dollars. The coupling of allegations of damage with the allegation of the amount in dispute, when it remains that in addition to these damages the property itself is involved, certainly does not reduce the amount, alleged to be in excess of two thousand dollars, down to the thirteen hundred dollars of damages;

these damages being but an incident to the recovery. It is not correct to say that because the real estate involved is mining land, the only value consists in the mineral contained in the ground; because, under the grant of the federal statutes, the full benefit of which is sought in an application for a patent, the claimant has the surface and all mineral therein contained, and the right to follow upon their dip veins having their apices therein, provided the claim is located and maintained in conformity with the requirements of the federal statutes and those authorized to be passed by the state in consonance. It seems impossible to contend, with any degree of plausibility, that where the whole litigation is waged for the purpose of determining who shall have the absolute title to property, the title to the property and the entire value which follows that title is not involved in the dispute and its value is not the amount which is involved.

III.

It is asserted several times in the brief of the defendant in error that whether or not an adverse suit is cognizable in the federal courts is in controversy between the Eighth and Ninth United States Judicial Circuits. We beg to dissent most positively from this assertion. Aside from the decision of Judge Hallett there has been no decision upon this subject in the Eighth Circuit, so far as we are advised, contrary to the position for which we contend, and certainly, up to the time of the dismissal of this case by Judge Hallett, no such de-

cision had been published within the Eighth Circuit. On the contrary, Justice Miller, sitting upon the Circuit, and later Justice Brewer, then Circuit Judge, announced the views for which we contend. Counsel have not cited us to a dicision in the Eighth Circuit other than Judge Hallett's, supporting the position they take, and we think it is safe to affirm, in view of the diligence and industry displayed by counsel in the preparation of their brief, that this failure to make citation is due to their non-existence. We hardly think counsel have dealt seriously with this matter, when they present a thrilling appeal on behalf of the poor mine owner litigant, as a reason why a federal court should not have jurisdiction of a litigation wherein there is to be determined, not merely the rights of the litigants upon the record, but of the United States as well. As a refutation of the sweeping assertion that federal jurisdiction would place an unjust power in the hands of wealthy litigants by means whereof they might drag the poor opponent away from his home to a populous city, there to be dealt with by an agrarian jury, swayed by the bold assertions of conscienceless experts, whereas, if the litigation should be conducted in the mining camp, the poor litigant, always in the right it would seem from the assertions of this brief, could and would present so strong a case that these same audacious experts would be powerless to persuade or influence the wise and experienced miners who would there compose the jury, we call attention to the fact that the framers of this law did not anticipate this oppressive feature of the statute, or else they would

have provided that the federal courts should have jurisdiction when the poor litigant selected that tribunal, or else only when the wealthy litigant was pursuing an equally wealthy one. It so happens that Colorado, whose area is so eloquently pictured by counsel, is not only wide in extent, and wealthy in mineral, and possessed of a varied population, but also has several places whereat the federal court sits to pass upon mining and other litigation as well. It also happens, as would have been observed prior to the recent creation of the County of Teller, that it was about as expensive and difficult to reach the county seat of El Paso County from the situation of the mines in question, as it was to reach Denver or Pueblo, at which the Federal court also sits, and that at Colorado Springs all the perils of a populous city, and all the disadvantages of a farmer jury would have been encountered. It is difficult to treat seriously these suggestions, and it is equally difficult to conceive that they have been seriously presented. The absurdity of this argument is intensified by a consideration of the wealth of the two defendants in this case and their probable influence where the mines are situated, as contrasted with the individual plaintiff.

We pass, without further discussion, the suggestion of the brief that a fair construction of this statute should be rejected because some wealthy litigant might sue a poor one in the federal court and away from the immediate location of the mines.

While some authorities are cited to the effect that the mere fact that mining properties are involved in litigation does not confer jurisdiction

upon the federal courts, none have been cited to the effect that in adverse suits federal courts should not have jurisdiction. The distinction between the two classes of litigation is striking. It might well be that a litigation would be waged with reference to the title to a mine when the federal laws and their construction would not be involved. For instance, there might be a suit to specifically enforce a contract for the sale of a mine, there might be an ejectment suit to recover possession, and in each case the character of a contract or deed might give rise to the litigation, in which none of the acts of location, nor the right of either parties to a patent, would be suggested or passed upon. It was after a full consideration of this distinction, and a wide experience in connection with this class of litigation, that Judge Sawyer announced the opinion, and sustained it by most cogent reasoning, which we cited in our opening brief. The statute originally passed, in which the words "court of competent jurisdiction" were implied, was prior to the act of 1881, in which certain requirements are made of the courts. We can see little force in the suggestion that because a state court might be a court of competent jurisdiction, *ergo* a federal court would not have jurisdiction.

In Inez Min. Co. v. Kinney (46 Fed. Rep., 832), cited by counsel for defendant in error, Judge Beatty, whose experience as a lawyer and a judge with mining adverse litigations is very extensive, points out the distinction to which we have called attention, and says, at page 34:

"Turning, now, to the pleadings, it will be found they constitute an action framed in pursuance of the statutes of Idaho for the quieting of the title to a piece of mining ground, which is no different in form from an action to quiet the title to any other land, the title to which depends upon some act of Congress. The laws of Congress are the basis of title to both mineral and agricultural lands, but that the title is involved is not alone sufficient to give a federal court jurisdiction. The question of jurisdiction in any such case is governed by the fact that such laws must or must not be construed in reaching a conclusion. The action based upon an adverse claim for patent to mining ground is an apparent exception to this rule, but jurisdiction in this action is not based alone upon a question of construction of the law. That action is especially contemplated by the statute; the government has instituted it as one of the means to the primary disposal of its dominion. To determine some questions, it substitutes a court for its land-office, and to some extent the government is interested that the just conclusion shall be reached."

The Court then proceeds to point out the difference between a suit to quiet title, when the property is a mining claim, and an adverse suit for the purpose of determining who shall receive title thereto from the government.

In the case of California Oil and Gas Co. v. Miller (96 Fed. Rep., 12), decided since we prepared our former brief herein, Judge Wellborn says:

"An action brought pursuant to sections 2325, 2326. Rev. St. U. S., where patent has been applied for, and adverse claim filed, is said to be an apparent exception to the rule above stated as to the essentials of a federal question. Mining Co. v. Kinney, *supra*. See also Rutter v. Mining Co., 75 Fed., 37; Mining Co. v. Rutter, 31 C. C. A., 223, 87 Fed., 801; Doe v. Mining Co., 43 Fed., 219; Bennett v. Harkrader, 158 U. S., 441, 15 Sup. Ct., 863; Chambers v. Harrington, 111 U. S., 350, 4 Sup. Ct., 428; Perego v. Dodge, 163 U. S., 160, 16 Sup. Ct., 971; 2 Lindl. Mines, Sec. 748. These cases are, perhaps, sustainable on either of the following theories: First, that the suit referred to in said action is but one step in a purely statu-

tory procedure, which has its inception, not in the court in which the suit is brought, but in the land office. Doe v. Mining Co., *supra*. Second, said section 2326, Rev. St., provides, among other things, that 'it shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim.' It can not be supposed that congress would subject the adverse claimant to forfeiture of his interest by reason of failure to institute suit, without providing a tribunal in which such claimant could sue as a matter of right. Now, since congress is powerless to confer jurisdiction on a state court, the presumption is a fair, if not necessary one, that said statute confers jurisdiction on federal courts."

While not an adverse case, the doctrine for which we contend, is also sustained by the case of Cates v. Producers' and Consumers' Oil Co. (96 Fed. Rep., p. 7).

Counsel, while claiming to have criticised, distinguished and overturned the cases explicitly in point which we have cited, failed to notice our comment upon the decision of this Court in Campbell v. Ellet (167 U. S., 166).

It is difficult to answer an argument which assumes that the many learned and experienced judges whose opinions we have relied upon were incapable of reading and comprehending the decisions which they have cited. We shall submit to this Court, without entering into a detailed discussion thereof, whether or not Judges Sawyer, Beatty, Hawley, Ross, and Justices Brewer and Miller, having the specific point under investigation, examining the authorities after argument, grasped the meaning of the cases quoted and relied upon

by them in the determination of this important question.

After all has been presented and said which could or should have been urged, it remains that the contemporaneous construction of these statutes, and especially by the judges who have applied and administered them, has been to hold with Justice Miller that necessarily these actions have arisen under the federal statutes, and, as a matter of course, the federal jurisdiction existed. Analyze, for a moment, section 2326 of the Revised Statutes of the United States, and it will be found that upon the judgment roll alone the successful party in this adverse litigation is authorized to proceed to the land department and there obtain a patent, upon filing therewith the surveyor's certificate of improvements and the description required in other cases. By this judgment many of the matters which, without the adverse were required to be proved to and passed upon by the land office, are determined conclusively by this adjudication. This judgment advises the land department authoritatively, and authorizes it to proceed upon that determination; that the adverse claimant is a citizen of the United States; that he has made due and proper discovery and location of his lode mining claim, in accordance with the requirements of the federal statutes; has maintained his possession, and made the expenditures required thereon by the federal statutes; that his location and possession were founded upon a primary valid discovery, upon unoccupied public mineral domain. That is to say, all these things are

required to be established, and are matters of paramount and vital importance, and yet, a decision in the adverse case establishes them, because the government has utilized the court for this purpose, in the administration of its interior department, and in the disposition of its public lands. It follows, necessarily, that when the court has thus been substituted by federal legislation for the United States land department, in determining these essential matters, that every adverse case involves, as between the applicant for a patent and the adverse claimant and litigant, all of these elements and requirements of the federal statute, to such an extent as to make the case one arising solely under the laws of the United States, and therefore one of concurrent federal jurisdiction. Section 2326, especially in connection with the amendment of 1881, which we have cited in the original brief, confers upon the court wherein the adverse litigation is carried on exclusive and conclusive jurisdiction to hear and determine a controversy as to all these matters and as to a compliance, upon these points, with the requirements of the federal mining statutes.

A reading of the case cited in our original brief, and some cited in the brief of the defendant in error, will disclose that adverse suits have repeatedly been taken to the Supreme Court of the United States for adjudication, on writs of error, from the highest state courts, because they involved a right asserted under the laws of the United States, which had been denied by the judgment below, without question being raised as to

the jurisdiction of this Court to hear and determine the same, because the suit was inherently, essentially and necessarily one arising under and involving the construction of federal statutes. We refer, among others, to the important case of Richmond Mining Co. v. Rose (114 U. S., 576).

In addition to the express decision and tacit recognition of federal jurisdiction in adverse suits, we find that the statute has been thus construed by the interior department, familiar with the questions involved and constantly called upon to consider, construe and apply the mining statutes. This appears from the Mining Circular, issued from the General Land Office, with the approval of the Secretary of the Interior, and which has for years included this clause:

> "Where an adverse suit has been filed but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the state court having jurisdiction in the case, and also by the clerk of the Circut Court of the United States, for the district in which the claim is situated, will be required."
>
> Paragraph 90, Mining Circular, approved June 24, 1899,

which is a repetition of the same clause, in circulars of previous dates.

All of which we respectfully submit.

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No. 275. 54

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THE SUPREME COURT

Filed March 20, 1899.

UNITED STATES.

OCTOBER TERM, 1898.

W. H. BLACKBURN,
Plaintiff in Error.
vs.
THE PORTLAND GOLD MINING COMPANY AND W. S. STRATTON,
Defendants in Error.

No. 275.

Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

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BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

This case was commenced in the Circuit Court of the United States on the 27th day of August, A. D. 1897. So far as the issue in this court is concerned, it presents only a question of jurisdiction. The jurisdiction of the United States Court was invoked upon the two grounds of diverse citizenship and the presence of a Federal question.

The defendants appeared and filed a motion to dismiss the action upon the ground of no juris-

diction, because it appeared upon the face of the complaint that it was not a suit between citizens of different states nor was it one arising under the constitution and laws of the United States. This motion was argued before the Circuit Court on the 8th day of November, 1897, was sustained, and the cause dismissed. A writ of error was then sued out to the Circuit Court of Appeals for the Eighth Circuit. This writ, upon the motion of defendants in error, was dismissed, for the reason that the Circuit Court of Appeals had no right to review a final judgment of a circuit court dismissing a cause for want of jurisdiction.

Blackburn vs. The Portland Gold Mining Co., 89 Fed. Rep., 1013.

Upon the filing of the motion to dismiss the writ of error to the Circuit Court of Appeals, the plaintiff sued out another writ of error to this court, so that two writs were pending at the same time, one to the Circuit Court of Appeals for the Eighth Circuit, and the other to this court. The writ to this court is dated the 17th of March, 1898, and is the one which is before the Court for disposition at this time.

But three questions are presented by the record:

First.—Is this a suit wholly between citizens of different states?

Second.—Does the matter in dispute exceed the sum or value of two thousand dollars? and

Third.—Is this a suit arising under the laws of the United States?

We will take these questions up in the order indicated.

I.

Is this a suit w'holly between citizens of different states?

The allegations of the complaint are that this is a suit between citizens of different states, in that the complainant, W. H. Blackburn, is a citizen of the State of Colorado; the defendant, The Portland Gold Mining Company, is a corporation organized under the laws of the State of Iowa, and that the defendant, Stratton, is a citizen of the State of Colorado. Under this allegation, of course, the Federal courts would have no jurisdiction, the plaintiff being a citizen of Colorado, and one of the defendants being also a citizen of that state. But the plaintiff, in the fourth paragraph of his complaint, attempts to avoid this difficulty by an allegation that the defendant, Stratton, is not a real party in interest, and that, therefore, the controversy is really one between the plaintiff Blackburn, a citizen of Colorado, and the defendant, The Portland Gold Mining Company, a corporation organized under the laws of the State of Iowa. But an examination of the allegations of the complaint, and a reference to the character of the action, will show that no such condition of affairs exists.

The complaint is one in ejectment, brought under the Colorado Code, and in support of an adverse claim filed in the land office. The defendant, Stratton, applied for a patent from the Government of the United States upon the Fairplay lode mining claim, in accordance with Sec. 2325 of the Re-

vised Statutes. The application was made in the United States Land Office at Pueblo, Colorado. The complaint avers that this application was made by Stratton in his own name. Section 2325 provides that any person, association, or corporation, authorized to locate a mining claim, having claimed and located a piece of land for such purpposes, and having complied with the terms of that chapter, may file in the proper land office an application for patent, under oath, which application must show a compliance with the law, and must be accompanied by a plat or map of the claim, made under the directions of the United States Surveyor-General; that he shall post a copy of such plat, together with his notice of application, upon the ground for a period of at least sixty days; that the Register of the Land Office shall then publish a notice of such application in a newspaper published nearest to the claim, which said notice shall be published for sixty days, and that the notice of the application shall also be posted in the office of the Register; that at the end of sixty days the applicant is entitled to his patent, if no adverse claim is filed. The complaint in this case alleges that within the sixty days above provided an adverse claim was filed by the plaintiff, and that this suit is brought in support of the same. Section 2326 provides that where an adverse claim is filed it must be upon the oath of the person filing it and that the land office shall then suspend any action until the controversy shall have been settled by a court of competent jurisdiction. The adverse claimant must within thirty days commence his suit in a court of competent jurisdiction to determine the question of the right of possession.

It is clear from these provisions that the applicant for the patent is the real party in interest and is a necessary party to any suit which may be brought. The plaintiff recognizes this position by making Mr. Stratton, the person who filed the application for patent, a defendant, but he also alleges that the said Stratton is not the real owner of the ground nor did he have any interest or title whatsoever therein, but that long prior to his application for a patent he had made and executed a deed of the Fairplay lode mining claim to the defendant, The Portland Gold Mining Company. It is for this reason that it is contended that the suit is really one between the plaintiff, Blackburn, and the defendant, The Portland Gold Mining Company. No such conclusion, however, can be deducted either from the allegations of the complaint or the statutes to which we have called attention. It is very evident from the terms of the statute that the controversy which the United States desires settled before it will issue a patent is one between the party who files this application for a patent and the person who files his adverse claim. It is undoubtedly a good ground to set up in a suit as a part of a cause of action that a person who has applied for a patent is not the real owner of the property. This might defeat his application for patent because the statute contemplates that only a person who is the owner of the claim and who has complied with the law shall be entitled to a patent. But this is an entirely different proposition from asserting that because the person who has applied for a patent is not the real owner that an adverse suit can be maintained between the person filing the adverse

claim and the real owner of the property, and that the applicant for a patent is not a necessary party thereto.

The Court below held, although the opinion is not set out in the record, that the only parties to a controversy of this kind were the applicant for the patent and the adverse claimant, and that the plaintiff had no right to bring in any other defendants. This rule is undoubtedly correct. The plaintiff has the right to allege in his complaint that the applicant for patent has parted with his interest, that the application is not made in compliance with the law, and, therefore, his adverse claim should be sustained. But this does not give him the right to bring in as a party defendant the person to whom he claims the defendant has conveyed his title. In other words, it is a question not of parties, but of the right of the applicant for a patent to have the same issued. In this view of the case the parties to this controversy, and the only parties to be recognized in law, are W. H. Blackburn, the adverse claimant, and W. S. Stratton, the applicant for the patent. As both of these gentlemen, under the allegations of the complaint, are citizens of the State of Colorado, the suit is one between citizens of the same state, and over which the Federal courts have no jurisdiction.

II.

Does the matter in dispute exceed the sum or value of two thousand dollars?

The complaint in this case does not show that the amount in controversy or the value of the

property involved exceeds the sum of two thousand dollars. The first allegation of the complaint is that the *amount in dispute in this cause* exceeds, exclusive of interest and costs, the sum of two thousand dollars. This is either a mere conclusion of law or a reference to the money involved, and no facts are afterwards averred which show that as a matter of fact, this amount of money, or property of that value, is in controversy. The subsequent allegations are that the defendant, Stratton, applied for a patent upon the Fairplay lode; that the plaintiff is the owner of the Echo lode, and the defendant entered upon a portion of said Echo lode and ousted the plaintiff therefrom. The portion is then described by metes and bounds. There is no allegation that this tract of land has any value whatever. It is described as containing 10.331 acres. The complaint then alleges that the defendants wrongfully withhold possession of said parcel of the Echo claim to the plaintiff's damage in the sum of one thousand dollars, and that in the preparation of the adverse claim the plaintiff expended the sum of three hundred dollars. The prayer of the complaint is that judgment be given the plaintiff that he is the owner of and entitled to the possession of said tract of land; that he recover from the defendant one thousand dollars damages for the detention, and three hundred dollars expended on behalf of said adverse claim. Thus we have an allegation that the matter in dispute exceed two thousand dollars, which is a conclusion of law, and when allegations of fact are set forth statements that the plaintiff has only suffered damages to a total of thirteen hundred dollars.

So far as the value of the property is concerned there is no allegation of any kind, nature, or description. The acreage is set forth, and this alone will furnish the only evidence of its value. The Court will take judicial knowledge of the fact that the Government sells its mineral lands at five dollars per acre. Ten acres of mining land would be worth fifty dollars. So that, taking the positive allegations of the complaint, and the value of the land as measured by the Government of the United States, there cannot be more than thirteen hundred and fifty dollars involved in this suit Even though it were a controversy between citizens of different states, or even though it involved a question arising under the constitution or laws of the United States, there is not a sufficient amount in controversy to give this Court jurisdiction.

The first section of the act of August 13, 1888, which this Court has declared was passed for the purpose of restricting rather than enlarging such jurisdiction, defines explicitly the jurisdiction of circuit courts. Its language as to the value of the amount in controversy is unmistakable. The statute reads as follows: "Where the *matter in dispute* exceeds, exclusive of interest and costs, *the sum or value* of two thousand dollars." The plaintiff in this case alleges "that the *amount in dispute* in this cause exceeds, exclusive of interest and costs, *the sum of two thousand dollars*." The Court will notice the distinction between the provisions of the statute and the allegations of the complaint. Even though we should consider that this allegation of the complaint was a statement of fact rather than a conclusion of law, it is a statement of fact that is modified

by the subsequent allegations of the complaint. The law is well settled that in actions of ejectment, it is the *value of the property* in controversy which determines the jurisdiction of the Court. Indeed, the earlier cases held that even though damages for detention should be asked far greater than the sum allowed for the jurisdiction of the Court, yet the jurisdiction would still be measured by the value of the land.

Mr. Justice Washington, in an early case, decided that where the value of the land was not stated in the complaint, the cause would be dismissed for want of jurisdiction.

Lanning vs. Dolph, 4 Wash. C. C., 624.
Same case, 14 Fed. Cas., 1120.

And in the Eastern District of Michigan, Judge Longyear dismissed a case because the complaint nowhere alleged the value of the land, although it did allege damages for its detention many times beyond the amount necessary to give the Court jurisdiction. The Court said that damages were only incidental to a suit in ejectment, and that the main issue was the value of the land.

Crawford vs. Burnham, 1 Flipp. 116.
Same case, 6 Fed. Cases, 774.

This principle does not seem to be questioned. Under the Colorado Code, however, judgment may be recovered in the same action for the damages sustained as well as for the land in controversy, so that we believe it would be held here that if the amount of damages claimed for the detention was sufficient, the Court would be given jurisdiction.

This question, however, does not enter into this case. Our contention is that there is no allegation in the complaint as to the value of the land. The allegation is that the *amount in dispute* exceed two thousand dollars. *Amount* can only refer to the money claimed in the complaint. The words of the statute are "*matter in dispute.*" This may mean either the value of the thing in controversy or the sum of money claimed. This in shown by Congress following up the words "*matter in dispute*" by the words "*sum or value* of two thousand dollars." That is, where the matter in dispute exceeds the sum of two thousand dollars, or has a value in excess of that amount. The pleader in this case only referred to the money actually involved, because he uses the words "amount in dispute," which clearly means the one thousand dollars damages and the three hundred dollars expenses incurred in filing the adverse claim. If he had intended to refer to the value of the land, and had said that the matter in dispute exceeds the *value* of two thousand dollars, he might possibly have brought himself within the terms of the statute; but there can be no mistake in the meaning of the words used. "*Amount*" cannot possibly be held to refer to the value of a tract of land, but can only refer to some particular sum of money, and as we have a sum of money actually in dispute, to-wit: thirteen hundred dollars, that sum must limit and control the general allegation that it exceeds two thousand dollars.

The complaint suggests still another question. This suit involves, not the legal title to the land in controversy, but the mere possessory title. While

the possessory title may be of great value, yet it is not the legal title. This Court has decided, in a late case, that the possessory title is simply an inchoate right, which may some day ripen into full title or fade away into nothing.

Black vs. Elkhorn Mg. Co., 163 U. S., 445.

This Court and the land office have also decided that the judgment rendered is simply of an advisory character upon the land department, and does not necessarily carry with it a right to the legal title.

The Alice Placer, 4 Land Decisions, 314.
Perego vs. Dodge, 163 U. S., 160.

In a suit over the possessory title, where damages are claimed for its detention, what is the value of that title, separate and apart from the damages themselves? This is mining land, whose only value consists in the mineral contained in the ground. If a person takes possession of another's mining claim, and a suit arises out of that act, is the value of the land in controversy, or is it simply the value of the ore that was taken out by the person committing the trespass? In other words, is there any value to a possessory title aside from the profits arising from the possession? We do not believe there is. Here the complainants only claim that during the time the defendants were in possession of the tract of ground described in the complaint they damaged the plaintiff in the sum of one thousand dollars. Can it be claimed that anything else than this amount is in controversy in this suit? It may be that the land is worth several hundred thousand

dollars, but so long as neither party can show a legal title, but only claims the right to possess and enjoy it, can it be said that this value is in issue? We submit that, under the allegations of the complaint, it does not appear that there is two thousand dollars involved in this litigation.

III.

Is this a suit arising under the laws of the United States?

The plaintiff realizing that he cannot maintain the suit as one between citizens of different states also sets up that it is one arising under the constitution and laws of the United States. This presents a most important question. If the Court should hold that the complaint is sufficient upon the amount in controversy then the only question that remains to be settled is the one we are now discussing. Sections 2325 and 2326 of the Revised Statutes are as follows :

"2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Surveyor-General, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent,

in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The Register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the Register a certificate of the United States Surveyor-General that five hundred dollars worth of labor has been expended, or improvements made upon the claim, by himself or grantors; that the plat is correct; with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that a plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the Register and the Receiver of the proper Land Office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

"Section 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same,

and shall show the nature, boundaries, and extent of said adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy has been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the Register of the Land Office, together with the certificate of the Surveyor-General that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the Receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the Register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the Court, to rightly possess. If it appears from the decision of the Court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the Surveyor-General, whereupon the Register shall certify the proceedings and judgment-roll to the Commissioner of the General Land Office, as in the preceding case, and patent shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

Congress says that adverse claims must be settled in a "court of competent jurisdiction." These words are used twice in Section 2326. Does the mere fact, that a suit brought to determine the possessory title to a lode mining claim upon the public domain is brought in support of an adverse claim filed in the land office, make it one arising under the constitution and laws of the United States? This question has been answered differently in different tribunals. In the Circuit courts of some of the districts comprising the Ninth Circuit it has been answered in the affirmative. In the Circuit courts of the Eighth Circuit it has always been answered in the negative. In the District of Colorado, Judge Hallett has always refused to take jurisdiction of an adverse suit simply because it was an adverse suit.

The cases cited in the brief of the plaintiff in error have all originated in the Ninth Circuit. It is clear under the authorities that possessory actions to recover mining claims, or to settle questions connected with a mere possessory title, are not suits arising under the laws of the United States, unless made so in the same way that other suits are made so, namely, by showing that it is necessary to construe some law of the United States to arrive at a correct decision, or that the parties are citizens of different states.

We will first look at this class of cases. Judge Sawyer, whose opinion is entitled to great respect on account of his experience in dealing with cases of this kind, early announced that these actions did not arise under the Federal statutes. We quote the following from his very able opinion:

"I have had no little difficulty in satisfactorily construing this act. In the broad sense claimed by some, nearly all cases relating to title to lands would be swept into the national courts; for in the new states, in every action of ejectment involving a question as to the real title, one party or the other goes back to a patent, or other grant under the laws of the United States. Since the passage of the act of Congress of 1866, and subsequent acts upon the same subject, expressly declaring the public lands to be free and open to exploration and occupation for mining purposes, subject to the local laws, regulations, and customs of miners; also, authorizing a sale and patent to parties establishing a right under such local laws, regulations and customs, it seems to be claimed, on this broad principle, that all suits relating to disputes about mining claims may be transferred to the national courts. But, clearly, the great majority of such cases only involve a litigation of precisely the same questions as were litigated in those classes of cases for the many years since the acquisition of California prior to the passage of those acts of Congress; and they turn upon no disputed construction of the constitution or statutes of the United States. In fact, where a patent is authorized to be issued to the possessor under these acts in a contested case, the statute refers the parties to the ordinary tribunals of the country to determine, under the local laws and customs, irrespective of the acts of Congress, which party is entitled to the mining claim, and the patent issues to the party so determined to have the right. (*Four Hundred and Twenty Mining Co. vs. Bullion Mining Co.* Case No. 2989.) Thus the rights of the parties are determined by the laws, regulations and customs of the locality outside the acts of Congress, without any discussion or controversy as to the construction of those acts. Since some of this class of cases transferred to this court were retained, but with no little hesitation, the Supreme Court of the United States has decided several cases, which afford a rule for the future, and which, it seems to me, exclude jurisdiction in many

cases which the bar appears to have supposed could be transferred. The case of *McStay vs. Friedman*, 92 U. S., 723, was a case in which one of the parties relied: 1. On the statute of limitations; 2. On title acquired through the City of San Francisco under the well-known Van Ness ordinance, and the act of the Legislature confirming it. On a writ of error to the state court, it was sought to sustain jurisdiction of the United States Supreme Court, on the ground that the title derived through the city depended upon the act of Congress of 1866 (14 Stat. 4), granting the land to the city in trust for those who held the ordinance of the city, state statutes, etc.

"The Court says: 'At the trial no question was raised as to the validity or operative effect of the act of Congress. * * * The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error, and this did not depend upon the constitution or any treaty, statute of, or commission held, or authority exercised under the United States.' *Romie vs. Casanova*, 91 U. S., 380, is a similar case. At the present term of the Supreme Court, in a case which was actually transferred from the state court to this court, under section 2 of the act of 1875, the same ruling was made. One party claimed certain lots in San Francisco by virtue of possession, in pursuance of the provision of the Van Ness ordinance, and the statutes of the state, and of the United States, confirming said title; while the city claimed the same as being part of the public squares reserved and set apart for public purposes, in pursuance of the same ordinances and statutes. After the transfer a demurrer was interposed to the jurisdiction of this court, on the ground that it presented no question arising under the act of Congress, the rights of the parties depending upon the construction of the ordinances of the city and the state statutes alone. On the other hand, it was earnestly urged that it was necessary to construe the act of Congress in order to find out who the beneficial grantee intended by the act of Congress

was. The Court, however, held that the act of Congress referred the question as to who was entitled to the land to the city ordinances and the statutes of the state upon the subject, and that their rights must be determined by a construction of those ordinances and statutes. The Supreme Court affirmed this ruling at the present term, thus holding that the same principle adopted in relation to the section providing for writs of error to the state courts, is, also, applicable to cases of transfer from the state to the national courts under section 2 of the act of 1875; that is to say, that unless there is some contest as to the construction of the act of Congress, there is no jurisdictional question in the case. (*Hoadley vs. San Francisco*, 94 U. S., 4.)

"So with reference to mining claims. The act of Congress grants certain rights to those who discover, take up, and work mining claims. But it refers the parties to the local laws of the states and territories, and to the rules, regulations, and customs of miners of the districts where the mines are situated for the measure of their rights. If a dispute arises, as in the cases referred to, the act of Congress refers the parties to the ordinary tribunals, to determine it by the local laws and customs, and not by the act of Congress. Upon the trial of the right to a mining claim precisely the same questions are tried, and they are determined by the same laws and customs that are invoked as the measure of the rights of the parties before the act of Congress had been passed. Clearly, the great mass of these cases cannot involve the discussion or any dispute as to the construction of any act of Congress; and when they do not, under the decisions cited, this Court is without jurisdiction, so far as this provision of the act is concerned. Where the controversy is upon matters other than the construction of the constitution or an act of Congress, the 'correct decision' of such controversy cannot possibly 'depend upon the right construction of either.' No controversy can possibly arise upon the construction of an act of Congress, where all parties agree as to its construction. There may be

a contest as to other matters, but not as to the construction of the constitution or laws in such cases."

Trafton vs. Nouges, 4 Sawyer, 178.
Same case, 24 Fed. Cases, 123.

This decision of Judge Sawyer has been uniformly followed in all of the western states and territories, we think, without an exception.

Murray vs. The Blue Bird Mining Co., 45 Fed. Rep., 385.
Inez Mining Co. vs. Kinney, 46 Fed. Rep., 832.
Southern Pac. R. R. Co. vs. Whittaker, 47 Fed. Rep., 529.
Butler vs. Shafer, 67 Fed. Rep., 161.

It has received the sanction of this Court in a case which has become leading upon matters of jurisdiction.

Gold Washing Co. vs. Keyes, 96 U. S., 199.

In a number of later decisions to which we will call attention, the same principle has been announced.

We then can take it as settled that an ordinary action of ejectment or bill in equity to settle rights connected with a mere possessory title claimed under the mining laws is not cognizable in the Federal courts. Does the mere fact, that a judgment recovered in an action of this kind is made evidence by the Federal statutes for the purpose of conferring a United States patent, make any difference as to the jurisdiction of the courts? In other words, does the mere fact that such a suit is

brought in support of an adverse claim, make it a case arising under the constitution and laws of the United States? Let us look and see whether upon principle there can be any distinction between this class of cases and all other cases involving rights to mining claims.

The United States is the paramount owner of the public domain situated in the western states and territories. As such it is an ordinary land owner. It may keep or sell its land, just as it sees fit. From 1849 to 1866 it permitted its mineral lands to be occupied by its citizens, and those citizens to extract whatever valuable minerals were found therein. These persons were mere trespassers, and the Government at any time could have removed them and declared that it would reserve to itself all of the precious metals found in those lands. It could have adopted the system of leasing in vogue prior to that time; it could have worked the mines itself; it could have sold them, reserving a certain percentage, or taken any other course it might see fit. Until 1866 it did absolutely nothing. It tacitly permitted a system of law to spring up relating to the acquisition, holding and disposition of rights to the metals found in this land. All of the law relating to mines arising in this way depended wholly upon state and territorial statutes and the local rules and customs of miners. In 1866 Congress passed an act recognizing these local rules and regulations, giving them full force and validity and decreeing that a patent or the legal title might issue from the United States to persons who had fully complied therewith. Finally, in 1872, a more elaborate code of

laws was enacted, in which possessory titles were more thoroughly defined and legal titles made easier to obtain, and more certain and definite in their character.

These statutes of the United States simply recognize and enforce the law which the miners themselves had already enacted. The United States simply said to the trespassers upon its lands, that it had concluded to recognize their trespasses, to carry out the rules and regulations which they had made between themselves as trespassers, and convey to them the legal title. So far as possessory titles themselves were concerned, Congress did little or nothing. But two conditions are laid down in the Federal law concerning the acquisition of a possessory title. One is that there must be a discovery of mineral, and the other, that the claim must be marked upon the ground. The other provisions of the statute simply prescribe outside limitations as to the size of the claim; detail what shall be contained in a location certificate where one is required; and give to the owner of a claim, when properly located, the exclusive right of possession to the surface and of all lodes that apex therein. All other matters relating to the location of claims are relegated in express terms to the state Legislature and to the miners themselves in their mining districts. In Colorado, for instance, the essential requisites for the proper location of a mining claim are nearly all governed by state statutes. These state laws provide that, to locate a valid mining claim, there must first be a discovery of mineral; second, the posting of a notice; third, the sinking of a discovery shaft to a

depth of at least ten feet; fourth, the marking of the boundaries of the claim by six substantial posts; and, fifth, the preparation and filing of a location certificate. In the location certificate six essential features are required by statute, namely: first, the name of the lode; second, the name of the locator; third, the date of location; fourth, the number of feet along the lode in each direction from the discovery shaft; fifth, the general course of the lode; and, sixth, such a description of the claim as will identify it with reasonable certainty. The preliminary notice to be posted at the point of discovery must consist of a plain sign containing the name of the lode, the name of the locator, and the date of the discovery. Of all these various requirements necessary to make a valid location the Federal law requires but two—the making of a discovery and the marking of the boundaries. All of these other matters, and the marking itself, so far as details are concerned, are provided by state statute. It is very evident that in any controversy which may arise concerning the validity of a location the chances are ten to one that the question to be decided will be one solely of state law; and even under the Federal law the only question that can possibly arise at the present time is one of fact.

Can it be said that because in a suit brought to determine the rights to a mining claim it becomes necessary to construe a state statute that it therefore becomes a suit arising under the laws of the United States, because these state statutes derive their force and effect from an act of Congress? The state statutes, of course, are simply regulations made by the state, pursuant to a permission granted by the United

States. Ultimately they are to be tested by, and derive all their force from, Federal law. Can it not well be said that wherever it is necessary to construe the state statutes we have a suit arising under the laws of the United States? But we have seen that this Court, and all of the United States Circuit Courts that have ever passed upon the question, have uniformly held that such a suit is not one arising under the laws of the United States. It is a controversy to be settled by local tribunals, in accordance with local laws, and, unless it is one between citizens of different states, or unless it becomes necessary actually to construe the Federal statute, it cannot be brought in the courts of the United States. Does an adverse suit arise any more under Federal laws when only state laws or local rules and regulations are to be coustrued?

What is the true nature of an adverse suit? A person having a possessory title, secured to him by the Federal and the state law, desires to obtain the legal title. He applies to the owner of the soil, the United States, for a patent, which is nothing more nor less than an application to buy the land. It is an offer made by an intending purchaser to the owner. The owner has previously declared that he will sell the land upon certain conditions, and that the first one to comply with those conditions will have the right to purchase. In order to ascertain whether or not the conditions have been complied with, the owner says that he will advertise the application for a period of sixty days, and any person who desires to say that the applicant has not complied with the conditions may come in and say so. He must then bring a suit in some

court of competent jurisdiction to determine this question. The owner will do nothing with the application until that question is determined. Whoever is successful in this suit may bring the judgment-roll, and he will then convey the title. In accordance with this the advertisement is made. Some one comes in and asserts an adverse claim, and a suit is brought upon it. The United States being the proprietor, says that this suit must be brought in some court of competent jurisdiction. Is there any difference between the condition here required and the condition of complying with state laws in general? In other words, does the mere fact that the Government prescribes, as one of its conditions of purchase, that adverse claims must be settled in the courts, give to the Federal courts the power to try these cases any more than when it says rules and regulations made by the states and by the miners must be complied with, confer upon the Federal courts the right to determine in all controversies whether those statutes, rules and regulalations, have been complied with? In reason we cannot see any distinction between the two cases. Whether or not a person has sunk a discovery shaft, raises the question of whether or not he has complied with the laws of the State of Colorado. A discovery shaft is not required by the Federal law, but is required by the law of Colorado. Whether he has complied with this requirement is a matter which may arise in any litigation concerning a possessory title. It may be the sole question in an adverse suit or it may be the sole question in an ordinary action of ejectment. Does the fact that the judgment may be used as evidence in an

application for patent, make any difference as to the jurisdiction of the tribunal that is to determine it?

The same questions may arise upon an application for patent without a law suit. The United States requires evidence that a discovery shaft has been sunk, whether it comes in the shape of a judgment, or whether it comes in the shape of testimony by witnesses. When we look at the object and purposes of the statute, we can see no distinction in principle between an adverse suit and any other suit involving title to mining lands. The judgment in an adverse suit is simply made evidence of the fact that an applicant for a patent has complied with the state and federal statutes. It is simply one element in the application for a patent. The United States simply requires the adverse claimant to bring it or waive any claim to the ground.

Looking at the statute itself we see that Congress was very careful not to confer jurisdiction in these cases upon the Federal courts. It was very careful to use the words "courts of competent jurisdiction." In other similar cases Congress has conferred jurisdiction upon the Federal courts. For instance, when it created the Bank of the United States the charter of the bank provided that the bank could sue and be sued in all state courts of competent jurisdiction, and in any Circuit Court of the United States. This Court held in an opinion which has become a classic that by virtue of this provision the bank could be sued in the Federal courts.

Osborn vs. United States Bank, 9 Wheat., 738.

The Court will note the words, "courts of competent jurisdiction," were even then being used by Congress. In that particular case Congress expressly provided that both the state courts and the Circuit Courts of the United States should have jurisdiction." In the statute at bar no such provision is found. We simply have the term "courts of competent jurisdiction." In the course of his opinion in the above cause, Chief Justice Marshall said: "It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may with the same propriety give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States as give that right to the bank. This distinction is not denied; and if the act of Congress was a simple act of incorporation and contained nothing more it might be entitled to great consideration." It seems to us that the statute under consideration comes within this distinction. Congress, as in this instance, simply said that the party succeeding in a court of competent jurisdiction may present his judgment-roll and have a patent. The *cause of action itself* does not arise under the laws of the United States any more than any other cause of action relating to a mining controversy. It is simply the fact that the decision may be evidence that a party is entitled to a patent that makes the action different from any other. It is the character of the parties litigant, and not the subject matter of the controversy which makes the suit an adverse suit rather than one concerning mere possessory rights. For the sole reason that

the parties are asking the Government of the United States for a legal title, it is termed an adverse suit.

As already stated, in the District of Colorado, the Circuit Court has uniformly held that cases of this kind cannot be brought in the Federal courts merely because they are of this class. Any other ruling would simply swamp the Federal courts of that district with business. Nearly two thousand adverse suits have arisen from the Cripple Creek mining district alone, and within the past three or four years. The great bulk of these would have been brought in the United States Court if it were possible to bring them there. It is safe to say that at least fifteen hundred cases would have been filed in the Federal courts from Cripple Creek alone, and yet the entire Federal docket in Colorado, since it was admitted as a state, has not reached four thousand cases.

Let us look at the reasons given by the various Circuit Courts which have held that cases of this kind may be brought in the Federal courts. The most important case is that of *Burke vs. The Bunker Hill Mg. Co.*, 46 Fed. Rep., 644. This was a suit tried by Judge Sawyer, then Circuit judge, and Judge Beatty, District judge for the District of Idaho. The opinion upon this point was delivered by Judge Sawyer. His Honor conceded that as a matter of first impression the Federal courts would not have jurisdiction, but he thought that the amendment to Section 2326, made in 1881, might change his views, and, in any event, that he ought to follow what he conceived to be the rulings made by Mr. Justice Miller, Mr. Justice Brewer, and, inferentially, some of the decisions of this

Court. We quote the following from Judge Sawyer's opinion:

"It seems to us, that all the authorities, as they now stand, have determined the question in favor of the affirmative of this proposition. Thus the point was directly decided on the circuit on a motion to remand, this being the only point on the motion, by Mr. Justice Miller of the Supreme Court, in *Frank G. & S. M. Co. vs. Larimer M. & S. Co.*, 8 Fed. Rep., 724. A like decision was made by Justice Brewer, then Circuit Judge, in *Cheesman vs. Shreve*, 37 Fed. Rep., 36. So the same ruling was made by Knowles, J., in *Strasburger vs. Beecher*, 44 Fed. Rep., 213. Says the Judge:

> 'As to this suit, I am clearly of the opinion that it is one which arises under the laws of the United States. It is a suit instituted in pursuance of the provisions of Section 2326 of the Revised Statutes of the United States. See *Frank G. & S. M. Co. vs. Larimer M. & S. Co.*, 8 Fed. Rep.. 724. One of the objects of such an action is to determine who is entitled to a patent to the premises in dispute. The judgment is filed in the United States land office on the determination of the action. To some extent the United States is a party to the action. *See Jackson vs. Roby*, 109 U. S., 440. 3 Sup. St. Rep., 301. This decision must be based upon the theory, it appears to me, that the action, pursuant to an adverse claim, has for one of its objects the determination as to whether either party has divested the United States of the possessory title to the premises in dispute.'

"That is to say, it is not only intended to determine the rights of the two parties as *between themselves, but also as between each of the parties and the United States, so as to determine* finally whether either party has so far performed the conditions prescribed by the statute as to entitle him to pay for the mine and receive a patent from the United States, *thereby making the United States*

substantially, though not formally, a party to the suit, and *entitled to have their rights determined in the national courts.* This idea is supported by the amendment to Section 2326 of 1881 (1 Supp. Rev. St., 609), which provides as follows:

> 'That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the revised statutes, title to the ground in controversy *shall not be established by either party; the jury shall so find, and judgment shall be entered according to the verdict.* In such cases costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground *in controversy until he shall have perfected his title.*'

"It would seem that, under section 2326, as it originally stood, when a party applied for a patent to a mine, and there was an adverse claimant, the parties were referred to the ordinary courts to determine in the usual actions, applicable to the cases, the rights of the adverse claimant, only as between themselves; such as an action to recover possession, and a suit to determine an adverse claim when in possession; the question between the successful party and the Government being left to the determination of the Commissioner of the Land Office. But the amendment seems designed to change the whole proceedings, and refer, not only the question of the rights of the parties as between themselves, but also, without making the United States formally a party, to transfer the whole matter, as between the United States and the successful party, to the courts, thereby making the United States substantially, though not formally, parties to the suit; and, on that ground, it would seem that the United States are entitled to have their rights determined in the national courts. *Jackson vs. Roby*, 109 U. S., 444; 3 Sup. Ct. Rep., 301, and *Wolverton vs. Nichols*, 119 U. S., 485; 7 Sup. Ct. Rep., 289, seem to support the idea, also, that not only the rights of the parties, as between themselves, but, also, the

rights, as between the parties, respectively, and the United States are to be conclusively determined. These rulings, cited from the Federal Reporter, appear to be sustained by the Supreme Court of the United States, in *Chambers vs. Harrington*, 111 U. S., 350, 4 Sup. Ct. Rep., 428, where the Supreme Court entertained an appeal, apparently, because it was an action brought under section 2326, Rev. St. See also *Doe vs. Mining Co.*, 43 Fed. Rep., 219. Whatever we might think, were this a case of first impression, arising under section 2326 *before its amendment* we do not feel at liberty now to question the ruling of so many cases decided by eminent judges, and by the United States Supreme Court, as we understand their decisions. We, therefore, hold upon these authorities, that the record shows a case for national jurisdiction, as arising under the laws of the United States for the reason, that it was brought in pursuance of the requirements of section 2326, as amended, and, therefore, it is not within the decisions of *Trafton vs. Nougues*, 4 Sawy., 178, and *Water Co. vs. Keyes*, 96 U. S., 199, and cases following those decisions. These jurisdictional facts all appear in the pleadings, and are not required to be otherwise shown in the request, or petition, to transfer to this court."

Burke vs. Bunker Hill Mg. Co., 46 Fed. Rep., 644.

Let us consider the cases relied upon in the language just quoted. The first is that of *The Frank Mg. Co. vs. The Larimer Mg. Co.*, 8 Fed. Rep., 724. This was a decision by Mr. Justice Miller. Instead of deciding the exact point as stated by Judge Sawyer, Mr. Justice Miller decided nothing of the kind. Judge Miller simply held that any mining suit must necessarily depend upon the mining laws of Congress, and the Federal courts, therefore, had jurisdiction of them. The question of whether or not an adverse suit is different from

any other kind of a mining suit was never presented, argued or considered. The same thing is true of the decision quoted of Mr. Justice Brewer, at that time Circuit judge.

Cheesman vs. Shreve, 37 Fed. Rep., 36.

That was not an adverse suit and the only point decided by Judge Brewer was that in a suit where it would be necessary to construe section 2322 of the Revised Statutes giving to the owner of the apex of a vein the right to go under an adjoining property a federal question was presented. We quote Judge Brewer's opinion in full to show that this was the only point involved, and also to show that his construction of Judge Miller's opinion is the same as ours:

"These defendants are entering beneath the surface, within the side lines of ground patented to complainants, and seeking to mine and take ore therefrom. *Prima facie* they are trespassers. They justify this entrance under authority of the laws of the United States and especially section 2322 of the Revised Statutes, which give to the owner of a vein, lode, or ledge, the top or apex of which lies within the surface lines of his own location, the right to follow that vein downward, outside of the side lines of his location, and into territory whose surface belongs to another. Involved in their claim is the question whether there is such a vein as is provided for in that section; a question as to the right of entrance, as affected by the priority of location and the dip of the vein. These questions are presented, and, whatever may be the true answer thereto, it is obvious, from past judicial expressions, that they cannot be considered as mere sham, or pretended, but as real substantial questions. Hence, as questions arising under the laws of the United States, they present a case cognizable

by the Court. *Mining Co. vs. Larimer Co.*, 8 Fed. Rep., 724; *Starrin vs. New York*, 115 U. S., 248, 6 Sup. Ct. Rep., 28. As the defendants are entering within the side line of complainant's property, *prima facie* they are trespassers; and where the affidavits, upon an application for a preliminary injunction are conflicting, the rule is to preserve the possession as against such *prima facie* trespassers by a preliminary injunction, leaving the question of title to the property to be established by a suit at law. Temporary injunction will issue upon the giving of a bond in the sum of $25,000, conditioned according to law."

Cheesman *et al.* vs. Shreve *et al.*, 37 Fed., 36.

The next case cited by Judge Sawyer is *Strasburger vs. Beecher*, 44 Fed. Rep., 213, a decision by Judge Knowles in the Circuit Court for Montana. Judge Knowles did hold in that case that an adverse suit was one arising under the laws of the United States. But he based this ruling upon what he conceived to be Judge Miller's holding in the eighth Federal and the holding of this Court in *Jackson vs. Roby*, 109 U. S., that the United States was in a measure a party to the suit.

We will shortly call attention to *Jackson vs. Roby*.

Doe vs. Mining Co., 43 Fed. Rep., 219, is next cited by Judge Sawyer. That was a decision of Judge Ross in the Circuit Court for the Southern District of California. The only point necessary to decide in that case was that an adverse suit might be brought on the equity side. The case was afterwards affirmed by the Circuit Court of Appeals, but nothing was then said with reference

to an adverse suit being one that necessarily arose under the laws of the United States.

In addition to the above cases, Judge Sawyer relied upon three decisions of this court: *Jackson vs. Roby*, 109 U. S., 440; *Chambers vs. Harrington*, 111 U. S., 350; and *Wolverton vs. Nichols*, 119 U. S., 485.

It is thus seen, from this examination of his opinion, that Judge Sawyer had changed his views from what he held in *Trafton vs. Nougues*. The reason for the change, as stated by him, was to conform to these new cases, but when examined the cases do not decide what he thought they did. Neither Judge Brewer nor Judge Miller have passed upon the proposition which was before Judge Sawyer and are no authority for his position. We will presently see that this court, instead of supporting Judge Sawyer's view, has decided exactly the reverse.

The only other case that needs mention is a decision of the Circuit Court of Appeals for the Ninth Circuit, affirming Judge Beatty's decision in the case of *Rutter vs. Shoshone Mining Co.*, 75 Fed., 37. The court consisted of Judges Gilbert and Ross, Circuit Judges, and Hawley, District Judge. The court divided upon this question—Judges Ross and Hawley holding that the Federal court had jurisdiction, while Judge Gilbert held that it had not.

Shoshone Mining Co. vs. Rutter, 87 Fed. Rep., 801.

Under the decision of this Court the Circuit Court of Appeals, instead of deciding the question

of jurisdiction, should have certified that point to this tribunal.

United States vs. Jahn, 155 U. S., 109.
Robinson vs. Caldwell, 165 U. S., 359.

It is substantially held in these two cases, that a Circuit Court of Appeals, under the act creating it, has no right to pass upon the question of the jurisdiction of United States courts, but should always certify that question to this Court. But the court did decide the point and this decision as an argument for or against the jurisdiction is to be considered.

We think if the Court will compare Judge Hawley's opinion sustaining the jurisdiction with Judge Gilbert's dissenting opinion, it will be convinced that Judge Gilbert has the better of the argument. Judge Hawley simply goes over the cases to which we have called attention, and which were relied upon by Judge Sawyer. He relies upon Judge Miller and Judge Brewer and the other decisions just referred to. As already indicated, none of these sustain the point in favor of which they are cited. Judge Gilbert, on the other hand, rests his opinion upon the decision of this Court in *Bushnell vs. Smelting Co.*, 148 U. S., 682, and there can be no escape from the logic of his opinion. This Court decided in that case, as we will presently show, that no Federal question was necessarily at issue in an adverse suit. As Judge Gilbert well says, the plaintiff in a cause must show that a Federal question is in issue. If the contention of plaintiff in error is correct, then the only Federal question is that the suit is an adverse suit brought in support

of an adverse claim, and this must necessarily appear upon the face of the complaint. This did appear upon the face of the complaint in the Bushnell case, yet this Court held that no Federal question was presented, and that, therefore, it had no jurisdiction to review the action of the Supreme Court of Colorado.

These are the only cases that we know of which sustain the jurisdiction. Let us now look at the other side.

The State Court of Nevada passed upon a case shortly after the law of 1872 was passed. The opinion of the Court was delivered by Judge Hawley, then of the Supreme Court of Nevada. Judge Hawley, in the course of his opinion, said:

"Congress did not, by the passage of this act, or by the acts passed July 26, 1866, and July 9, 1870, confer any additional jurisdiction upon the state courts. The object of the law, as we understand it, was to require parties protesting against the issuance of a patent to go into the state courts of competent jurisdiction and institute such proceedings as they might, under the different forms of action therein allowed, elect, and there try 'the right of possession' to such claim, and have the question determined. The acts of Congress do not attempt to confer any jurisdiction not already possessed by the state courts, nor to prescribe a different form of action."

The 420 Mining Co. vs. The Bullion Mining Co., 9 Nev., 240.

This is a contemporaneous construction of the statute by a Court that was probably in a better position to know what the framers of the law intended than any other Court in the United states.

And in a controversy between these same companies, a few years later, Judge Sawyer announced the same thing. He said:

"After a careful consideration of the acts of Congress set out in the statement of the case, it is clear to my mind that it was the intention of Congress to give the right of purchase of a mining claim to a silver or gold bearing lode or vein, to the person or association of persons who, in pursuance of the laws of the state or territory and the local mining customs, rules and regulations of the place where located, recognized by the laws and enforced by the courts, is the owner and entitled to the possession as against everybody except the Government of the United States. It will be seen that the act expressly refers to, and recognizes, the laws of the state or territory, the local customs, rules and regulations not in conflict with the laws of the United States, the decisions of the courts, and even, in express terms, the state and territorial statutes of limitation applicable to the subject. The act requires the party seeking a patent to file a diagram of the claim, and post a copy in a conspicuous place on the claim, together with a notice of intention to apply for a patent, and requires the register of the land office, also, to publish a notice of the same, in a newspaper published at the nearest place, for ninety days. It then authorizes the adverse claimant, before approval of the survey, to file a protest, upon which all proceedings are stayed 'until final settlement and adjudication, in the courts of competent jurisdiction, of the rights of possession to such claim, when a patent may issue as in other cases.' *That adjudication is to be had in the ordinary courts, and to be determined under the ordinary rules, regulations, customs and laws of the locality. It seems impossible to come to any other conclusion than that the party who at the time can maintain his right to the claim in the courts of the country* as against any person but the United States, under the local laws, customs, rules and regulations, is the party upon whom Con-

gress intended to confer the right to purchase, no matter how that right originated, *if, under such laws and customs and decisions of the courts*, he has the present right. And this is simply a right to purchase—a privilege given to the party, of which he may avail himself or not, exactly like a pre-emption law, and founded upon similar reasons and policy. And what this privilege is is stated in the cases of *Hutton vs. Frisbie*, 37 Cal., 479, and *Frisby vs. Whitney*, 9 Wall., 76 U. S., 191. The case is in no wise like the case of an inchoate, imperfect Spanish grant, but is in all respects like a case under the pre-emption laws.

"The object of a determination of the right by litigation, where there is an adverse claim, is simply to ascertain the party who has the right to the claim *under the laws of the state and local rules and customs*."

The 420 Mining Company vs. The Bullion Mining Company, 3 Sawyer, 634.

Same case, 9 Fed. Cases, 592.

The italics are ours. Judge Sawyer at that time believed that it was *impossible to come to any other conclusion* than that the state courts were the ones to try these cases. This was the universal understanding. It is only within the last few years that the idea has taken root that the Federal courts had jurisdiction.

Judge Hallett has always held, in the District of Colorado, that the Federal Courts were not clothed with jurisdiction of such suits *per se*, and we understand this has been the rule in all the districts of the Eighth Circuit. We thus have the Eighth against the Ninth Circuit, and the earlier rulings in the Ninth agreeing with the Eighth.

But the decisions of this Court would seem to leave little or no doubt upon the proposition. *Jackson*

vs. Roby, 109 U. S., 440, which is so much relied upon, was an adverse suit brought between citizens of different states in the Circuit Court of the United States for the District of Colorado. There was never any question raised as to the jurisdiction of the United States Court generally of adverse suits, nor was it necessary. The parties in the case were citizens of different states. But the point determined in the case involved a construction of Section 2324 of the Revised Statutes and presented a case arising under the laws of the United States, independent of any other consideration, and of whether or not the suit was brought in support of an adverse claim. The only point determined was as to what work could be counted for the mutual benefit of a group of claims.

Chambers vs. Harrington, 111 U. S., 350, is cited in support of the proposition that the Federal courts have jurisdiction; but an examination of that case will show that this point was really not determined. That was an appeal from the Supreme Court of the Territory of Idaho. It came to this Court by virtue of being an appeal from the Supreme Court of a Territory, and, like any other case of a similar nature. So far as that case decides anything, it is in favor of the position maintained by us Mr. Justice Miller in deciding the point said:

"It is now urged that such a judgment is not subject to review in this court, and the appeal should be dismissed.

"But it is apparent that the statute requires a judicial proceeding in a competent court. *What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction,*

whether it be a state court or a Federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, *or the proper case is made on a writ of error to a state court,* the judgment may not be brought to this court for review as in other similar cases."

Chambers vs. Harrington, 111 U. S., 350.

The Court will note that Mr. Justice Miller is very careful not to say that actions of this kind may be brought in the Federal courts in the first instance. He says the statute means a court of general jurisdiction, whether it be a state court or a Federal court; and when it comes to a test between state and Federal jurisdiction, he seems to think that the case is governed by the rules relating to all other kinds of cases, as he says, in conclusion, that to bring a case from a state court to this Court, a proper case must be made. The words "*proper case*" show that there is no distinction between an adverse suit and any other suit when it comes to the jurisdiction of the Federal courts.

Wolverton vs. Nichols, 119 U. S., 485, is also cited as authority. But an examination of that case will show that this question was not involved. That, like *Chambers vs. Harrington*, was brought to this Court by a writ of error to the Supreme Court of a territory, the territory in that case being Montana. Like *Chambers vs. Harrington*, it is governed solely by the law relating to territorial courts.

The only case in which this Court ever passed upon the point in issue was—

Bushnell vs. Crooke M. & S. Co., 148 U. S., 682,

and that is squarely in favor of our contention. That was a suit brought in the state courts of Colorado. Upon being brought it was removed into the Circuit Court of the United States. Judge Hallett then remanded the case back to the State courts; it was tried in the State courts; the unsuccessful party appealed to the Supreme Court, and that court affirmed the judgment of the lower court. A writ of error was then sued out from the Supreme Court of the State of Colorado to this court. The defendant in error moved to dismiss the writ upon the ground that this court had no jurisdiction. It will be seen that the exact point in controversy here was involved in that case. The Court dismissed the writ of error, saying that the case clearly presented no Federal question, nor was one necessarily involved in the suit itself.

Bushnell vs. Crooke Mining & S. Co., 148 U. S., 682.

The conclusion of the Court in that case is conclusive of the present one. If no Federal question was necessarily involved in that suit, none is necessarily involved in any adverse suit. That was an adverse suit of the same character as the present one, and the conclusion of the Court that it had no jurisdiction is conclusive of the case at bar. This court has also decided that a mere mining controversy does not necessarily present a Federal question, and that a suit concerning such a controversy is not one arising under the laws of the United States.

Colorado Central Co. vs. Turk, 150 U. S., 138.

Gillis vs. Stinchfield, 159 U. S., 658.

Indeed, section 910 of the Revised Statutes expressly provides that possessory actions of this kind shall not be affected by the fact that the paramount title remains in the United States.

And this Court has announced practically the doctrine of the Supreme Court of Nevada, that these adverse cases are to be tried by the local state tribunals. Mr. Justice Miller says:

"It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defense against the party making publication; but, throughout the whole of these sections, and the original statute from which they are transferred to the Revised Statutes, the words 'claim' and 'claimant' are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the Government by way of patent. And the purpose of the statute seems to be that, where there are two claimants to the same mine, neither of whom has yet acquired the title from the Government, *they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal, located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the actions of the officers of the Land Department in determining which of these claimants shall have the patent*, the final evidence of title, from the Government. This view is consistent with the entire statute on the subject, and some of its language is inconsistent with the idea that any contest to be thus decided is between a party who already has the legal title to the property which he claims, and some other party, who is only setting up a claim to the same property."

Iron Silver Mining Company vs. Campbell, 135 U. S., 286, 289.

The italics are ours, and show how the Court regards actions of this kind. How can a local

tribunal of the neighborhood decide these controversies if they can be brought in a Federal court hundreds of miles away? The land offices are more numerous, and nearer the neighborhood, than the Federal courts.

Mr. Lindley in his late and very excellent work upon mines, says that the Federal courts undoubtedly have jurisdiction of these cases, and he bases this upon two grounds, and suggests a third. Let us note what his grounds are. He states them as follows:

"(1). The questions involved necessarily arise under the laws of the United States, and are essentially Federal in their nature.

"(2). The tribunal is one of the only class of courts upon whom Congress has the power to confer jurisdiction.

"A third reason is also suggested, viz.: the United States is necessarily a *quasi* party to the action."

2 Lindley on Mines, Sec. 747.

Let us take up these reasons for a few moments. The first one is that the questions involved necessarily arise under the laws of the United States and are essentially Federal in their character. This is but a simple begging of the question. It is simply a statement that the case is one arising under the laws of the United States because it arises under those laws. But we have seen that this is not true of mining controversies in general. While in a sense they necessarily arise under the laws of the United States because the paramount title to the ground is in the United States and laws for the acquisition of title must be

laws of the United States, at the same time it is held that where those laws have been construed and where it is not necessary for a new construction, or where the only laws involved are state laws, that the case is not one to be brought in the Federal courts. So that Mr. Lindley's first reason amounts to nothing.

His second reason is that the tribunal is one of the only class of courts upon whom Congress has the power to confer jurisdiction. And with this reason is the other suggested that the United States is a *quasi* party to the action. If these reasons are good for anything, they mean that the Federal courts have exclusive jurisdiction. If the United States is a party to the action, or if the court must be one over which the United States has control, then the Federal courts are the only ones which can hear and determine controversies of this kind. But both positions have been decided against Mr. Lindley's reason, both by this Court and other Federal tribunals. This Court has decided that the United States is not a party to the action, is not bound by the judgment, and that the only effect of the judgment is to make it evidence, and the land office is to use it simply as one of the links in the chain of title presented by the party applying for the patent.

Perego vs. Dodge, 163 U. S., 160.
Last Chance Mg. Co. vs. Tyler Mining Co., 157 U. S., 683.

And the land office has decided in a number of cases that notwithstanding the judgment rendered in the courts, it has still the right and it is

the duty of its officers to determine whether or not the applicant has complied with the Federal law and is entitled to a patent.

The Alice Placer, 4 Land Decision, 314.
Aurora Lode vs. Bulger Hill and Nugget Gulch Placer, 23 Land Decisions, 95.

The latter case is very instructive for the reason that an adverse suit had been brought to determine a controversy between a placer owner and a lode owner. The owner of the placer had won and was given a decree for the ground in controversy. That judgment was affirmed by this Court.

Bennett vs. Harkrader, 158 U. S., 441.

But the land office said that notwithstanding the decision of this Court the placer applicant was not entitled to the ground, that he was only entitled to his placer ground as such, and that the lode owner was still entitled to his lode claim.

In regard to the proposition that the Federal courts are the only ones upon which Congress has the right to confer jurisdiction, it is only necessary to say that Congress is not conferring jurisdiction by this statute upon any court. It is simply providing that a person applying for a patent upon land must settle any adverse rights which may exist relating to his possessory title in some court of competent jurisdiction before the patent will issue. This possessory title is one which depends upon state legislation and local rules and customs of miners. Its ownership may be fought out in any tribunal of competent jurisdiction. Congress does not *confer jurisdiction* upon state courts or upon

Federal courts to determine any question, and does not attempt to interfere with or regulate state courts in the slightest degree. It imply says to an adverse claimant: "If you have any rights in this land arising under the laws of the state or the local rules and customs of miners, you must settle those rights before some competent tribunal, and bring to the proper officer a certified copy of the judgment-roll showing that those rights have been settled." Instead of the statute conferring jurisdiction upon a court, it simply requires of the applicant the performance of a certain condition.

The adverse claimant is not required to bring his suit; he may either sue for or waive his claim. The application for a patent is in the nature of a proceeding *in rem*. The applicant is required to give notice to the world, and parties having adverse claims may either assert them or keep still. If they do assert them, they must procure, for the guidance of the Land Department, proof of a certain kind, and within a certain time. One of the kinds of proof required by the statute is a certified copy of a judgment-roll in certain instances, but is nonsense to say that because this character of proof is required that Congress is thereby conferring jurisdiction upon a particular court to secure it. Congress has nothing to do with the court; the Land Department has nothing to do with the court. The United States simply suspends action until the machinery of the court has been put in motion and its decision has been rendered.

In regard to Judge Sawyer's reason for changing his mind, this Court has answered it conclusively. Judge Sawyer thought that the amendment

of 1881 made the United States a party to the action, and that while under the original action these cases must be tried in the state courts, under the amended act the Federal courts had jurisdiction. This Court, however, has explained that the act of 1881 changed nothing except to direct that *the courts should determine whether either party was entitled to possession.* Under the ordinary rules of procedure if a plaintiff failed to make out his case in an action of ejectment the defendant was entitled to judgment. Thus in an adverse suit a defendant would get a judgment for possession without proving any compliance with the law of possessory rights. This judgment would entitle him to a patent from the Government. Congress simply sought to correct this condition of affairs and compel the party getting the judgment to prove his possessory title It was never intended to make the United States a party or preclude its rights in the slightest degree. This is made clear by this Court. Thus, Chief Justice Fuller says:

"We do not think the intention of this act was to change the methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the Court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. * * * It must be remembered that it is 'the question of the right of possession' which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdic-

tion which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the Government may be determined by the courts in a suit against the latter. *United States vs. Jones*, 131 U. S., 1; *Last Chance Mg. Co. vs. Tyler Mg. Co.*, 157 U. S., 683, 694."

Perego vs. Dodge, 163 U. S., 160.

Had these views of this Court been announced when Judge Sawyer considered the case of *Burke vs. Bunker Hill Mining Co., supra*, he would probably have reached a different conclusion and adhered to his former decisions. However that may be, it is clear that every reason advanced by courts or text writers for conferring jurisdiction on the Federal tribunals has been conclusively answered by this Court.

The inconvenience and injustice of giving to Federal courts jurisdiction of this class of cases, irrespective of parties or the questions involved, is readily apparent. Congress has provided land offices all over the western states and territories. The object is to provide a cheap and convenient method of acquiring title to lands. If a suit is necessary to determine the possessory title, the same conveniences should be given to suitors. Mining properties are always located in mining counties, where juries, familiar with the subject, can be obtained. The Federal courts are generally located in populous cities, where juries are drawn from the cities themselves, or from the surrounding agricultural country. They are usually at a long distance from the residence of the owners of mining claims. The state of Colorado is much larger than all New England; it is hun-

dreds of miles from many of the mining counties to the city of Denver or Pueblo, where the United States courts are held. The expense of coming to Denver to try an adverse suit and of bringing witnesses, will practically preclude the bulk of the owners of mining claims from any trial whatever. If, on the other hand the state courts are permitted to try this class of cases, the suits can be brought in the county wherein the property is located; the witnesses all reside at or near the county seat; a jury of miners can be obtained; they are permitted to view the premises and the case will be decided according to the very right of the cause. We know of no instrument of oppression greater than the right of a wealthy suitor to bring a mining case in the United States Court when his opponent is a poor man. A wealthy litigant can summon his expert witnesses who are able to testify upon the stand with a confident and convincing air that is almost certain to carry the day with a jury drawn from an agricultural region. The other party can only bring a few of his fellow-miners. The distance from the property precludes the idea of a jury making a personal examination. But if the case is tried in a mining camp, this expert testimony will be in vain before a jury composed of miners who are permitted to go and examine the property. We do not believe that Congress intended that this condition of affairs should exist. While it may be true that this disadvantage always results where one party is wealthy and the other poor, and that this condition of affairs does not always exist, yet the fact is that it is almost certain to exist in a large number of cases, and it will certainly spring

into existence much more rapidly when it is once known that all these suits can be brought in the Federal courts.

The limitation that a suit must involve two thousand dollars is no limitation at all. No one has ever located a mining claim in any of the western states and territories, but what he was willing to testify that its value was largely in excess of two thousand dollars. That is one proposition upon which both sides of every adverse suit will be unanimous. So that if this Court should hold that the Federal courts have jurisdiction of all adverse suits simply because they are adverse suits, it means that all of these cases can be brought in the United States courts. We do not believe that such is a fair construction of the statute. We believe that the matter has been decided adversely in the case of *Bushnell vs. the Smelting Company*, and we confidently believe that this Court will adhere to this decision.

Respectfully submitted,

C. S. THOMAS,
W. H. BRYANT,
H. H. LEE.

Attorneys for Defendants in Error.

BLACKBURN v. PORTLAND GOLD MINING COMPANY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLORADO.

No. 54. Argued and submitted October 18, 1899. — Decided January 8, 1900.

The provision in Rev. Stat. § 2326 for the trial of adverse claims to a mining patent "by a court of competent jurisdiction," does not relate to any particular court, state or Federal; but it was the intention of Congress in this legislation to leave open to suitors all courts competent to determine the question of the right of possession.

A controversy between rival claimants under that and the previous section can be properly determined by a state court, if the usual conditions of Federal jurisdiction do not exist, and the judgment of the Supreme Court of a State in such case cannot be reviewed by this court, simply because the parties were claiming rights under a Federal statute.

The court does not undertake to say that no case can arise under this legislation, which turns upon a disputed construction, and therefore presents a question essentially Federal in its nature.

This was an action brought on August 27, 1897, in the Circuit Court of the United States for the District of Colorado, by William H. Blackburn, a citizen of the State of Colorado against the Portland Gold Mining Company, a corporation of the State of Iowa, and W. S. Stratton, a citizen of the State of Colorado.

It was alleged in the complaint that the amount in dispute in the cause exceeded, exclusive of interest and costs, the sum of two thousand dollars; that the suit was of a civil nature at common law, and arose under the laws of the United States; that it was an adverse suit, and a suit arising under the provisions of sections 2325 and 2326, Revised Statutes of the United States, and is what is known as a suit in support of an adverse claim; that the defendant, W. S. Stratton, had applied for a patent for a portion of the Fairplay Lode mining claim, survey lot No. 9331, under and by virtue of the provisions of section 2325, and that the plaintiff Blackburn, under and by virtue of section 2326, had filed his adverse claim and protest

against the entry of said portion of said Fairplay claim, upon the ground that a part thereof was held and owned by the plaintiff as a part and parcel of the Eacho Lode mining claim; that said W. S. Stratton, on or about the 4th day of February, 1897, had made application in the United States land office at Pueblo, Colorado, for a patent on said portion of said Fairplay Lode mining claim under said section 2325, and that at the time he made his said application he was not the real owner of said portion of Fairplay Lode mining claim, neither did he have any interest or title whatsoever therein; that long prior to said time the said Stratton had by good and sufficient deed conveyed all his right, title and interest in and to said claim to the Portland Gold Mining Company, defendant, and for that reason the plaintiff brought this action against the said the Portland Gold Mining Company jointly with said Stratton; that on February 1, 1897, and ever since, the plaintiff was and is the owner of and in actual possession of the Eacho Lode mining claim, 1500 by 300 feet, situate in the Cripple Creek mining district, El Paso County, State of Colorado, and that plaintiff has the legal right to occupy and possess the same by virtue of a full compliance with the local rules and regulations of miners in said mining district and of the laws of the United States and of the State of Colorado, and by preëmption, discovery and location thereof as a lode mining claim located on the public domain of the United States; that on February 4, 1897, the defendant wrongfully and unlawfully entered into and upon a parcel of the said Eacho Lode mining claim described as follows, to wit: All that part of said claim which is intersected by the exterior lines of survey No. 9331, known as the Fairplay Lode mining claim, as shown by plat marked B, filed on July 28, 1899, in the land office of the United States at Pueblo, Colorado, with the adverse claim of plaintiff against the entry of said survey lot for patent; that the defendant has ever since wrongfully withheld possession of said parcel of Eacho Lode mining claim from the plaintiff, to his damage in the sum of one thousand dollars; that this suit is brought in support of said adverse claim within thirty days after the filing of said adverse claim, and that plaintiff

Counsel for Parties.

has necessarily disbursed and expended the sum of one thousand dollars for plats, abstracts and copies of papers filed in said land office with said adverse claim, and also a reasonable counsel fee, to wit, two hundred dollars for the expense of preparing his said adverse claim.

The plaintiff prayed for a judgment that he is the owner and entitled to the possession of and patent to the above-described parcel of said Eacho Lode mining claim, and for the recovery of the same; for the sum of one thousand dollars damages; for the sum of three hundred dollars expended in behalf of said adverse claim, and for costs of suit.

On November 8, 1897, the defendants, The Portland Gold Mining Company and W. S. Stratton, moved the court to dismiss the cause for the following alleged reasons:

1st. That the court has no jurisdiction either of the parties or the subject-matter of said suit:

2d. That both the plaintiff and defendants in said suit are citizens of the State of Colorado, and the same is not one wholly between citizens of different States:

3d. That it does not appear in said complaint that the amount in controversy in said suit is two thousand dollars:

4th. That it appears from said complaint that said suit is one which cannot under the Constitution and statutes of the United States be brought into this court.

On December 20, 1897, the court entered judgment dismissing the cause for want of jurisdiction, and signed a bill of exceptions at the request of the plaintiff, and also certified that the said question of jurisdiction of the Circuit Court of the United States was the only one involved in the said cause, and was the sole question upon which said cause was dismissed, and also allowed the present writ of error.

Mr. Charles J. Hughes, Jr., for plaintiff in error submitted on his brief.

Mr. W. H. Bryant for defendants in error. *Mr. C. S. Thomas* and *Mr. H. H. Lee* were on his brief.

MR. JUSTICE SHIRAS, after stating the case, delivered the opinion of the court.

As the court below filed no opinion, we are not distinctly informed upon which of the several grounds alleged the court proceeded in dismissing the cause for want of jurisdiction, and therefore it will be necessary for this court to consider each and all of them.

First, then, does the record disclose that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars? The allegation in the complaint is "that the amount in dispute in this cause exceeds, exclusive of interest and costs, the sum of two thousand dollars;" and it is also made to appear that the matter in dispute is the title to a mining claim, for which, and for damages and expenses amounting to thirteen hundred dollars, the plaintiff demands judgment. The defendants did not think fit to traverse these allegations, but moved to dismiss on the face of the complaint. Upon such a motion, as upon a demurrer, a court will not incline to dismiss for want of jurisdiction unless the facts appearing of record create a legal certainty of that conclusion. *Barry* v. *Edmunds*, 116 U. S. 550; *Wetmore* v. *Rymer*, 169 U. S. 115. We are not impressed by the criticism that the *amount*, instead of the *matter*, in dispute is alleged to have exceeded two thousand dollars. The meaning of such an allegation is clear, and in the absence of any traverse thereof, and of any pretence that, in point of fact, the matter in dispute did not exceed the sum or value of two thousand dollars, we think that the record fairly imports the necessary jurisdictional amount.

The next contention, that the Circuit Court could not take jurisdiction because the record did not disclose that the controversy was between citizens of different States, seems to us to have been well founded. The complaint alleged that Stratton, one of the defendants, was a citizen of the same State as the plaintiff. Not only was Stratton named as a party defendant in the complaint, but a summons was sued out against him as such; and the motion to dismiss the complaint was made

in behalf of Stratton as well as of the Portland Gold Mining Company.

It is, however, argued that, as it is alleged in the complaint that Stratton had conveyed by deed his interest in the mining claim to the Portland Gold Mining Company, Stratton was a nominal party only, whose presence on the record would not defeat the jurisdiction of the court as between the other parties; and cases are cited in which it has been held that the jurisdiction of the Federal courts will not be defeated by the mere joinder or non-joinder of formal parties. *Wormley* v. *Wormley*, 8 Wheat. 421; *Wood* v. *Davis*, 18 How. 467; *Walden* v. *Skinner*, 101 U. S. 577.

But considering the nature of the suit and the relief sought thereby, we are not prepared to hold that Stratton was a purely formal and unnecessary party. It is clear, from the provisions of sections 2325 and 2326, Revised Statutes, that they contemplate a controversy between an applicant for a patent and an adverse claimant. Under the first of these sections Stratton, as the complaint shows, made personal application in the United States land office at Pueblo for a patent.

In order, therefore, that a controversy could arise under these sections, Stratton must have complied with the provisions of section 2325 by having located a piece of land and by having filed in the land office an application under oath for a patent, showing compliance, together with a plat and field notes of the claim, made by or under the direction of the United States surveyor general, showing accurately the boundaries of the claim, which shall be distinctly marked by monuments on the ground, and by having posted a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and by filing an affidavit of at least two persons that such notice has been duly posted, and by filing a copy of the notice in the land office.

It is quite evident, under these provisions and the allegations of the complaint, that, when Blackburn desired to file an adverse claim, he was informed by the proceedings in the

land office that Stratton was the applicant for the patent and was asserting his compliance with the statute, and was therefore a proper and necessary party to make defendant. Why he included the Portland Gold Mining Company as a party defendant is not quite evident, but it may be conjectured that he wished to raise some question as to the validity of Stratton's proceedings in the land office after he had, as alleged, parted with his interest in the claim. However this may be, we are of opinion that Blackburn could not proceed safely and formally to raise an issue by an adverse claim without making the person claiming the patent a party defendant when he instituted his proceedings in court.

Nevertheless, even if the Circuit Court could not take jurisdiction of the case because the controversy was not between citizens of different States, it is claimed that the court had jurisdiction because an adverse suit, or suit brought in support of a protest and adverse claim, under the provisions of sections 2325 and 2326 of the Revised Statutes, is a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal court, regardless of the citizenship of the parties.

This presents an important question, one that has been differently answered in the lower courts which have been called upon to decide it. *Burke* v. *The Bunker Hill Man. Co.*, 46 Fed. Rep. 644; *Trafton* v. *Nouges*, 4 Sawyer, 178; *Rutter* v. *Shoshone Mining Co.*, 75 Fed. Rep. 37; *Shoshone Mining Co.* v. *Rutter*, 59 U. S. App. 538.

It may be well to quote in full the language of the sections in question:

"Sec. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States

surveyor general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor general that five hundred dollars' worth of labor has been expended, or improvements made upon the claim, by himself or grantors; that the plat is correct; with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that a plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

"SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boun-

daries and extent of such adverse claim, and all proceedings, except the publication of notice, and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patent shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

The first observation to be made is that Congress did not intend to prescribe jurisdiction in any particular court, state or Federal. "It shall be the duty of the adverse claimant, within thirty days after filing his claim, to *commence proceed-*

ings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment."

The natural inference from this language is that the competency of the adjudicating court was not to be determined by the mere fact that the mining claims in controversy consisted of lands the title to which was in the United States. If that fact alone were to be decisive no other than a Federal court would have been mentioned. We think the intention of Congress, in this legislation, was to leave open to suitors all courts competent to determine the question of the right of possession. If the parties to the controversy were citizens of different States, and if the matter in dispute exceeded the sum or value of two thousand dollars, then the claimant might elect to commence proceedings in a Federal or in a state court, because either would be competent to determine the question of the right of possession. But if the usual conditions of Federal jurisdiction did not exist, that is, if there was no adverse citizenship, and if the matter in dispute did not exceed two thousand dollars, then the party claimant could proceed in a state court.

This court has frequently been vainly asked to hold that controversies in respect to lands, one of the parties to which had derived his title directly under an act of Congress, for that reason alone presented a Federal question. Thus, in *Romie* v. *Casanova*, 91 U. S. 379, which was an action brought to recover the possession of certain lands in the city of San José, the question to be determined was, which of two parties had actually obtained a grant of the particular premises in question. The title of the city had originated before the cession of California to the United States. But this court said: "The title of the city was not questioned. Even if it depended upon the treaty of Guadalupe Hidalgo and the several acts of Congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it." Accordingly the writ of error to the Supreme Court of California was dismissed for want of jurisdiction.

Again, in *McStay* v. *Friedman*, 92 U. S. 723, where, in ejectment for a part of the lands confirmed to the city of San Francisco by an act of Congress, the validity and operative effect of which were not questioned, this court held that it had no jurisdiction to review the judgment of the Supreme Court of California, saying: "No Federal question was involved in the decision of the Supreme Court. The city title was not drawn in question. The real controversy was as to the transfer of that title to the plaintiffs in error; and this did not depend upon the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States."

Gold Washing and Water Co. v. *Keyes*, 96 U. S. 199, was a suit in equity in a state court of California, and brought on petition into the Circuit Court of the United States on the allegation that its determination involved the construction of certain laws of the United States affecting rights in public and mineral lands. The Circuit Court remanded the case to the state court on the ground that no real or substantial controversy, properly within the jurisdiction of a Federal court, appeared to be involved. That judgment of the Circuit Court was affirmed by this court in an opinion of Mr. Chief Justice Waite, a portion of which was as follows:

"The attempt to transfer this cause was made under that part of section 2 of the act of 1875, which provides for the removal of suits 'arising under the Constitution or laws of the United States.' In the language of Chief Justice Marshall, a case 'may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.' *Cohens* v. *Virginia*, 6 Wheat. 379. Or when 'the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, or sustained by the opposite construction.' *Osborn* v. *Bank of United States*, 9 Wheat. 822.

* * * * *

"In this petition the defendants set forth their ownership, by title derived under the laws of the United States, of certain valuable mines, that can only be worked by the hydraulic process, which necessarily requires the use of the

channels of the river and its tributaries in the manner complained of; and they allege that they claim the right to this use under the provisions of certain specified acts of Congress. They also allege that the action arises under, and that its determination will necessarily involve and require the construction of, the laws of the United States specifically enumerated, as well as the preëmption laws. They state no facts to show the right they claim, or to enable the court to see whether it necessarily depends upon the construction of the statutes. . . . The statutes referred to contain many provisions; but the particular provision relied on is nowhere indicated. A cause cannot be removed from a state court simply because, in the course of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved. . . . Before, therefore, a Circuit Court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts, in legal and logical form, such as is required in good pleading, that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States."

What is meant by the provision in section 2326, that the question of the right of possession should be determined by a court of competent jurisdiction, was thus spoken of in *Chambers* v. *Harrington*, 111 U. S. 350:

"It is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a Federal court; and, as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent upon the laws of the United States, we see no reason why, if the amount in controversy is

sufficient in a case tried in a court of the United States, or a proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review, as in other similar cases."

This statement is not inconsistent with the cases herein previously cited, as the right to review the judgment of a state court is said to be limited to a proper case having been made, clearly implying that some Federal question should be involved, and that a mere controversy as to the right of possession would not make such a proper case; for otherwise every case arising under section 2326 would be a proper case.

In *Iron Silver Mining Co.* v. *Campbell*, 135 U. S. 286, 299, Mr. Justice Miller in discussing the scope of these sections, said:

"It is true that there are no very distinctive words declaring what kind of adverse claim is required to be set up as a defence against the party making publication; but throughout the whole of these sections and the original statute from which they were transferred to the Revised Statutes, the words 'claim' and 'claimant' are used. This word is, in all legislation of Congress on the subject, used in regard to a claim not yet perfected by a title from the Government by way of a patent. And the purpose of the statute seems to be that where there are two claimants to the same mine, neither of whom has yet acquired the title from the Government, they shall bring their respective claims to the same property, in the manner prescribed in the statute, before some judicial tribunal located in the neighborhood where the property is, and that the result of this judicial investigation shall govern the action of the officers of the land department in determining which of these claimants shall have the patent, the final evidence of title, from the Government."

The ruling in *Bushnell* v. *Crooke Mining Co.*, 148 U. S. 682, is directly applicable to the present case. There a writ of error brought to this court a judgment of the Supreme Court of the State of Colorado. The suit was in ejectment brought by the Crooke Mining Company in a state court against Bushnell, to recover possession of a certain portion of the surface

location of a mining claim on Ute Mountain, and grew out of conflicting and interfering locations of mining claims. The claim of the latter was first located, but when the company applied for a patent Bushnell filed an adverse claim to a portion of the same location, and thereafter, under section 2326 of the Revised Statutes, and within the time prescribed therein, commenced his action in the state court. In the complaint it was alleged that the plaintiff was the owner of the Annie Lode mining claim, and that defendants had, at a certain date, entered upon and ever since wrongfully held possession of a part of said claim, specifically described, and that the action was in support of plaintiff's adverse claim to such portion of the surface location. The question presented on the trial of the controversy arose out of conflicting and interfering locations, and the court gave and refused certain requests to charge the jury, which appear at length in the report of the case in this court. The trial resulted in a verdict and judgment in favor of the plaintiff. An appeal was taken to the Supreme Court of Colorado, which affirmed the judgment of the lower court. The Supreme Court of Colorado rested its judgment upon the general proposition that the trial court had correctly stated to the jury the principal point in controversy, and had left it properly to them to determine, as a matter of fact, what was the course of the conflicting lodes. The case was then brought to this court and was heard on a motion to dismiss the writ or affirm the judgment.

Mr. Justice Jackson, in sustaining the motion to dismiss, said:

"It is plainly manifest that neither the pleadings nor the instructions given and refused present any Federal question, and an examination of the opinion of the Supreme Court affirming the action of the trial court as to instructions given, as well as to its refusal to give the instructions asked by the defendants below, fails to disclose the presence of any Federal question. It does not appear from the record that any right, privilege or immunity under the Constitution or laws of the United States was specially set up or claimed by the defendant

below, or that any such right was denied them, or was even passed upon by the Supreme Court of the State, nor does it appear, from anything disclosed in the record, that the necessary effect in law of the judgment was the denial of any right claimed under the laws of the United States.

"The decision of the Supreme Court of Colorado in no way brought into question the validity or even construction of any Federal statute, and it certainly did not deny to the plaintiffs in error any right arising out of the construction of the Federal statutes. It was said by the Chief Justice, in *Cook County* v. *Calumet & Chicago Canal Co.*, 138 U. S. 635, 653: 'The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.'"

Accordingly the writ of error to the Supreme Court of Colorado was dismissed.

The legal import of this decision plainly is that a controversy between rival claimants under sections 2325 and 2326 of the Revised Statutes may be properly determined by a state court, and that the judgment of a state Supreme Court, in such a case, cannot be reviewed by this court simply because the parties were claiming rights under the Federal statute.

Colorado Central Consolidated Mining Co. v. *Turck*, 150 U. S. 138, was brought to this court on a writ of error to the Circuit Court of Appeals for the Eighth Circuit. An action of ejectment by Turck against the mining company for possession of a certain lode mining claim had been tried in the Circuit Court of the United States for the District of Colorado, and determined in the plaintiff's favor. The case was taken by a writ of error to the United States Circuit Court of Appeals for the Eighth Circuit, and the judgment was there affirmed, and thereupon a writ of error was allowed to this court. The case was here heard on a motion to dismiss on the ground that the suit was between citizens of different States, and that, therefore, under the Judiciary Act of March 3, 1891, the judgment of the Circuit Court of Appeals was final. An attempt was made in argument to sustain the right

of this court to take jurisdiction because, although the suit was between citizens of different States, yet that the solution of the disputed ownership depended upon the construction and application of section 2322 of the Revised Statutes, concerning the dip and apex of lodes, and that hence the suit really and substantially involved a controversy only to be determined by reference to the Federal statute. But this contention did not prevail, and the writ of error was dismissed.

While it is true that the conclusion reached was mainly put upon the ground that the record did not disclose affirmatively that any distinctive Federal question was involved, yet, as the record did disclose a controversy between claimants arising under a Federal mining statute, it is a necessary implication of the decision that that fact alone did not render the case one of which the Circuit Court could take jurisdiction irrespective of citizenship, but that other and apt allegations were required showing that the controversy was determinable by one of two conflicting constructions of the Federal statute, and not one of mere fact in which the validity of the statute was not drawn into question.

A similar principle was involved in *Gillis* v. *Stinchfield*, 159 U. S. 658. That was a suit brought in a state court of California and concerned the ownership of a mining claim. The case was brought to this court, and it was claimed that, as the question in dispute could only be determined by an application of sections 2322 and 2336 of the Revised Statutes of the United States, such a state of facts appearing by the record, there was disclosed a Federal question which, of itself, gave this court jurisdiction to review the judgment of the Supreme Court of the State. But a motion to dismiss the writ of error was allowed. It is true that this court put its judgment on the ground that the judgment of the state Supreme Court was based upon an estoppel, deemed by that court to operate against the plaintiff in error upon general principles of law, irrespective of any Federal question. Still the case is authority for the proposition that controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the state courts, and that to enable

this court to review the judgment in such a case it must appear not only that the application of a Federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties.

In *Borgmeyer* v. *Idler*, 159 U. S. 408, it was held that the mere fact that the matter in controversy in an action is a sum of money received by one of the parties as an award under the treaty of the United States with a foreign power, providing for the submission of claims against that power to arbitration, does not in any way draw in question the validity or construction of that treaty, so as to confer jurisdiction on this court to review the judgment of a Circuit Court of the United States. In this case *Gill* v. *Oliver*, 11 How. 529, 545, was cited, in which a writ of error to the Court of Appeals of Maryland was dismissed because, although the matter in dispute was money derived under a treaty with Mexico, yet such a dispute did not involve any question as to the validity or construction of the treaty, Mr. Justice Grier saying: "Both parties claim money in court; and, in order to test the value of their respective assignments they introduce the history of the claim from its origin. The treaty and award are facts in that history. They were before the court, but as facts and not for construction. If A held land under a patent from the United States or a Spanish grant ratified by treaty, and his heirs or assignees dispute as to which have the best title under him, this does not make a case for the jurisdiction of this court under the twenty-fifth section of the judiciary act. If neither the validity nor the construction of the patent or title under the treaty is contested, if both parties claim under it, and the contest arises from some question without or *dehors* the patent or treaty, it is plainly no case for our interference under this section. That the title originated in such a patent or treaty is a fact in the history of the case incidental to it, but the essential controversy between the parties is without and beyond it."

It should not be overlooked that sections 2325 and 2326 form a part of a general scheme in reference to the mineral

lands of the United States. That scheme is contained in chapter six of the Revised Statutes of the United States, and includes sections from 2318 to 2352. Some light is thrown upon the intention of Congress, in the particular we are now considering, by other provisions than those expressed in sections 2325 and 2326.

Thus section 2319 enacts that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Section 2324 provides that "the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim," etc.

Section 2332 enacts that where claimants "have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto, under this chapter, in the absence of any adverse claim," etc.

Section 2339 provides that "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same," etc.

Without undertaking to say that no cases can arise under this legislation which turn upon a disputed construction, and therefore presenting a question essentially Federal in its

nature, we hold that clearly where a patent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations and customs of the mining district in which the lands are situated. In a case, therefore, like the present, where Federal jurisdiction does not arise because the parties are citizens of different States, and where no question is made as to the meaning and construction of the statutes of the United States, the state courts are to be regarded, within the letter and meaning of section 2326, as courts of "competent jurisdiction to determine the right of possession." The judgment of the Circuit Court is therefore

Affirmed.

MR. JUSTICE MCKENNA dissented.

MR. JUSTICE BROWN did not sit in this case, and took no part in its decision.